Supreme Court, U. S.
FILED
FEB 27 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 197_
NO. 77-1205

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER

v.

THEODORE MOODY,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO
THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI
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THE PETITIONER, THE COMMONWEALTH OF PENNSYLVANIA, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE PENNSYLVANIA SUPREME COURT ENTERED ON NOVEMBER 30, 1977, IN THE ABOVE-CAPTIONED CASE.

OPINIONS BELOW

THE OPINION BELOW OF THE PENNSYLVANIA SUPREME COURT IS SET OUT IN APPENDIX A, INFRA AT 1A - 42A. (THIS OPINION HAS NOT YET BEEN PUBLISHED IN THE NATIONAL REPORTER SYSTEM OR THE OFFICIAL STATE REPORTS.) ALSO INCLUDED IN THE APPENDIX IS THE OPINION AND SUBSEQUENT ORDER OF THE COURT EN BANC OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY. (APPENDIX B, INFRA AT 1B - 40B; APPENDIX C, INFRA AT 1C - 2C.)

JURISDICTION

THE ORDER OF THE PENNSYLVANIA SUPREME COURT WAS ENTERED ON NOVEMBER 30, 1977. THIS PETITION FOR CERTIORARI WAS FILED WITHIN NINETY (90) DAYS OF THE ENTRY OF THAT ORDER. THE JURISDICTION OF THIS COURT IS INVOKED PURSUANT TO 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. IS THE PENNSYLVANIA DEATH PENALTY STATUTE WHICH SUBSTANTIALLY RESTRICTS THE IMPOSITION OF THAT PENALTY AND WHICH ONLY MARGINALLY RESTRICTS THE MITIGATING EVIDENCE THAT MAY BE CONSIDERED AT SENTENCING, VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

2. EVEN IF THE MITIGATING CIRCUMSTANCES PROVISION OF THE PENNSYLVANIA DEATH PENALTY STATUTE IS OTHERWISE UNDULY RESTRICTIVE, IS A SENTENCE OF DEATH WHICH IS IMPOSED UPON A DEFENDANT SERVING A LIFE SENTENCE AT THE TIME OF THE COMMISSION OF THE RELEVANT OFFENSE NEVERTHELESS VALID FOR FEDERAL CONSTITUTIONAL PURPOSES?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT EIGHT.

EXCESSIVE BAIL SHALL NOT BE REQUIRED, NOR EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN, SECTION ONE.

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

The statutory provisions here at issue are 18 Pa.C.S.A. §1102 (Supp. 1977-1978, at page 45), which is entitled "Sentence for murder," and 18 Pa.C.S.A. §1311 (Supp. 1977-1978, at page 48-50), which is entitled "Sentencing for murder." The full text of these statutes is set out in Appendix D, infra at 1D - 4D.

STATEMENT OF THE CASE

Procedural History

Respondent, Theodore Moody, was charged in the Court of Common Pleas of Philadelphia County, as of February Sessions, 1975, Nos. 1429-1430, with murder, voluntary manslaughter, involuntary manslaughter, and criminal conspiracy. These charges arose out of the death of James Price, whose mutilated body was discovered in an unoccupied cell inside Holmesburg Prison, Philadelphia, Pennsylvania, on December 29, 1974.

Respondent's trial commenced on July 15, 1975, before the Honorable Lawrence Prattis and a jury. On July 22, 1975, he was found guilty of first degree murder and criminal conspiracy (R. 1014a).

The statutes applicable to the trial of respondent's case provided that a person convicted of first degree murder be sentenced to death or life imprisonment after a hearing to determine the existence of aggravating and/or mitigating circumstances (18 Pa.C.S.A. §1102 and §1311, infra in Appendix D at 1D - 4D, hereafter collectively referred to as the Pennsylvania Death Penalty Statute). Prior to that hearing, respondent objected to the statutorily mandated procedure, and challenged the constitutionality of the statute (R. 1020a - 1022a). The hearing was nevertheless held. At its conclusion, the jury found the existence of aggravating circumstances and the absence of any mitigating circumstances (R. 1043a).[1] As a consequence, imposition of the death penalty was statutorily required (18 Pa.C.S.A. §1311(d)).

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[1] The aggravating circumstances relied on by the Commonwealth at the hearing were that the offense was committed by means of torture (§1311(d)(1)(viii)) and that respondent was serving seven (7) consecutive twenty year to life imprisonment sentences at the time of the commission of the offense (§1311(d)(1)(ix)). Respondent, to establish the presence of mitigating circumstances, called his mother who testified as to his age (22) and the fact that he had not completed the tenth grade (R. 1028a). In addition, she stated that he was "easily led" and, in her opinion, not "quite mature" (R. 1028a).

Thereafter post-verdict motions were filed which included a constitutional challenge to the death penalty statute. On October 19, 1976, an opinion was filed by two members of a court en banc, the Honorable Lawrence Pratt is and the Honorable Juanita Kidd Stout, which declared the death penalty statute unconstitutional, indicated that a sentence of life imprisonment should be imposed, and rejected respondent's other allegations of error (Appendix B, infra at 1B - 38B). The third member of the Court, the Honorable David N. Savitt, concurred with that portion of the majority opinion which deemed non-meritorious respondent's arguments in support of a new trial and which held that United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209 (1968), prohibited the imposition of the death penalty in this case but neither reached nor expressed any opinion upon the constitutionality of the statute under the Eighth and Fourteenth Amendments (Appendix B at 39B).

Subsequently, on November 9, 1976, the court en banc issued an order (1) denying a Commonwealth Petition for Reconsideration, (2) denying respondent's post-verdict motions, (3) certifying that the question of the constitutionality of the death penalty was an appropriate issue for an interlocutory appeal, and (4) staying all proceedings (Appendix C at 1C - 2C).

Following the grant of a Petition for Permission to Appeal, which was filed by the Commonwealth, the Supreme Court of Pennsylvania, on November 30, 1977, affirmed the order of the court en banc which had declared the death penalty statute unconstitutional (Commonwealth v. Moody, infra at 1A - 42A).

Facts

At trial, the Commonwealth established that James Price's body was found hanging from a heating vent, inside an unoccupied cell on "D" block in Holmesburg Prison, Philadelphia, shortly after 3:00 p.m. on December 29, 1974 (R. 84a-86a). At the time of his death, Price shared a cell on "D" block with respondent, Theodore Moody (R. 106a). "D" block was itself a detention block within the confines of the prison; as a consequence, visitors from other cell blocks were prohibited and the movements of "D" block inmates were highly restricted (R. 93a-95a).

At the time Price was discovered, his body was suspended from the heating vent by bed sheets which were wrapped around his neck (R. 87a). Under those sheets, there was secured around the decedent's neck a ligature or garrot fashioned from three shoelaces, which produced death by means of strangulation (R. 218a). An examination of the body revealed numerous recent injuries to the decedent most notably in the area of his testicles and rectum.[2] These injuries, which were caused by multiple insertions of a sharp instrument and which could not have been self-inflicted, unquestionably were inflicted before death occurred and caused excruciating pain (R. 231a-232a, 234a).

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[2] Among those injuries were a 2-1/8 inch long tear in the decedent's skin, just to the right of his rectal opening, which extended from the middle of the scrotum halfway to the anal opening; a 1-2/5 inch wound involving the back portion of the area toward the spine; and an angled cut, in the area closest to the scrotum, which showed undermining or tunneling-out (R. 228a). Additional injuries found in this area of the decedent's body included: (1) a hole or wound extending to the rectum closure muscle; (2) discoloration involving the lining of the bowel at the anal ring; (3) a sharply tapered wound, at least 3-3/4 inches long, which penetrated the pelvic area; and (4) extensive hemorrhaging in both testicles (R. 229a-231a).

Two persons, who were detained in "D" block when this murder occurred, offered evidence relevant to the time and circumstances of Price's death. James Graves testified that he was in administrative segregation in cell 461 on that date and, therefore, was not allowed to leave his cell (R. 401a, 402a). At some point during the day, when most block inmates were in the yard for exercise, he heard someone screaming "God help me, I think they're killing me" (R. 404a, 403a). Subsequently, he heard sounds which suggested to him that the person crying out "was being muffled" (R. 405a).

The second inmate, Calvin Hunter, testified that he was sent to "D" block on the morning of December 29, 1974, and placed in cell 453, as a consequence of a disciplinary violation on "C" block (R. 266a). At approximately 9:00 a.m. on that date, the exercises in the yard stopped and the block "got unusually quiet" (R. 272a, 274a). He then heard a noise coming from the front of the cell block. As the noise came closer, he looked up and saw respondent, Theodore Brown, and John Griffin (two co-defendants) with "this little guy [Price, the decedent] in between them" (R. 276a). Shortly thereafter, Hunter heard, from a point beyond his cell toward cell 455, a man screaming for help and yelling "they're killing me" (R. 288a, 281a, 285a). When the noise stopped, Hunter saw respondent, Theodore Brown, and John Griffin walk back up the block (R. 288a).[3]

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3 Because of Calvin Hunter's death prior to trial, this testimony was introduced by reading to the jury the transcript of the (continued on next page)

Additional evidence presented by the Commonwealth was probative on the question of motive. Testimony relevant to this issue was offered by John Evans, Esquire, an Assistant United States Attorney for the District of Columbia (R. 482a). He indicated that, in connection with his position, he had occasion to supervise and assist in the investigation of the Hanafi Muslim murders, which occurred in Washington, D.C., on January 16, 1973 (R. 483a, 482a). Pursuant to that investigation, Mr. Evans had extensive discussions with the decedent, James Price, a suspect in those killings (R. 483a-485a). As a consequence of those discussions, Price agreed to cooperate with the authorities and gave a written statement which he adopted in the presence of a grand jury on July 5, 1973 (R. 485a, 486a, 508a). Certain portions of that statement, which implicated the respondent in the Hanafi Muslim massacre, were read at trial.[4] Additional testimony established that Price's statement, which implicated respondent, was turned over to respondent and his attorneys on April 2, 1974 (R. 519a-520a).

Footnote 3 continued
testimony given by him at the preliminary hearing which was conducted before the Honorable David N. Savitt on February 13, 1975 (R. 261a - R. 265a).

4 At the time of the Price slaying, respondent was serving fourteen (14) twenty year to life imprisonment sentences as a consequence of his conviction for seven (7) counts of first degree murder and seven (7) counts of first degree felony murder in connection with the seven (7) Hanafi Muslim murders. Seven (7) of these sentences were ordered to run consecutively. The remaining were ordered to run concurrently. For the purposes of this Petition, respondent shall be considered to have been serving seven (7) life sentences at the time of the commission of the new offense.

By way of defense, respondent presented testimony to establish that he and Price had a good relationship (R. 591a-592a, 623a, 649a-650a). He also attacked Hunter's veracity by introducing a prior inconsistent statement which had been made by Hunter (R. 782a - 790a) and called two witnesses who presented evidence bearing upon what consideration Hunter either received, or might have received, in return for his testimony (R. 804a-842a).

Moody himself disavowed any involvement in Price's death and offered alibi testimony which was corroborated by four inmates who testified on his behalf (R. 851a-859a, 678a-684a, 711a-713a, 733a-734a, 754a-756a). The jury, which chose to disbelieve this testimony, convicted respondent of first degree murder and criminal conspiracy (R. 1014a).

REASONS FOR GRANTING THE WRIT

I. THE PENNSYLVANIA DEATH PENALTY STATUTE, WHICH MARGINALLY RESTRICTS THE MITIGATING CIRCUMSTANCES TO BE CONSIDERED AND WHICH LIMITS MITIGATION TO THE DEFENDANT'S STATUS AT THE TIME OF THE COMMISSION OF THE OFFENSE, IS NOT VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Supreme Court of Pennsylvania, relying on this Court's 1976 decisions reviewing the constitutionality of the death penalty statutes of Georgia, Texas, Florida, North Carolina, and Louisiana[5] declared the Pennsylvania death penalty statute to be in violation of the Eighth and Fourteenth Amendments to the United States Constitution.[6] The result reached by the Pennsylvania Supreme Court was predicated upon a two-pronged analysis which relied in the first instance upon two excerpts from the plurality opinions filed in Woodson v. North Carolina, supra, and Jurek v. Texas, supra.[7] On the basis of its utilization of those statements, the Pennsylvania Court first concluded:

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5 Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001 (1976).

6 Commonwealth v. Moody, ___ Pa. ___, January Term, 1977, No. 280 (filed November 30, 1977) (Appendix, infra at 1A - 20A).

7 The two excerpts relied upon by the Pennsylvania Supreme Court stated, in part,:

(continued on next page)

> IN OUR VIEW, HOWEVER, THE CONSTITUTIONAL DEFECT OF (THE PENNSYLVANIA DEATH PENALTY STATUTE) IS THAT, UNLIKE THE STATUTES APPROVED BY THE SUPREME COURT, IT SO NARROWLY LIMITS THE CIRCUMSTANCES WHICH THE JURY MAY CONSIDER MITIGATING THAT IT PRECLUDES THE JURY FROM A CONSTITUTIONALLY ADEQUATE CONSIDERATION OF THE CHARACTER AND RECORD OF THE DEFENDANT...
>
> (I)N ORDER TO PROTECT A DEFENDANT FROM CRUEL AND UNUSUAL PUNISHMENT IN A CAPITAL CASE, IT IS NOW NECESSARY BOTH THAT THE AGGRAVATING CIRCUMSTANCES THAT WILL JUSTIFY THE IMPOSITION OF THE DEATH PENALTY BE CLEARLY DEFINED FOR THE SENTENCING AUTHORITY, AND THAT THE SENTENCING AUTHORITY BE ALLOWED TO CONSIDER WHATEVER MITIGATING EVIDENCE RELEVANT TO HIS CHARACTER AND RECORD THE DEFENDANT CAN PRESENT.

COMMONWEALTH V. MOODY, INFRA AT 12A, 16A (EMPHASIS IN ORIGINAL).

THE PENNSYLVANIA SUPREME COURT ALSO CONCLUDED THAT, EVEN IF THE PENNSYLVANIA DEATH PENALTY STATUTE'S MITIGATING CIRCUMSTANCES ARE BROADLY CONSTRUED, THE STATUTE IS NEVERTHELESS CONSTITUTIONALLY INFIRM BECAUSE IT RESTRICTS THE FACTORS WHICH MAY BE CONSIDERED BY THE JURY TO THOSE BEARING UPON THE DEFENDANT'S STATUS OR SITUATION AT THE TIME OF THE KILLING. SPECIFICALLY, THE COURT, IN N. 19, STATED:

FOOTNOTE 7 CONTINUED

> (W)E BELIEVE THAT IN CAPITAL CASES THE FUNDAMENTAL RESPECT FOR HUMANITY UNDERLYING THE EIGHTH AMENDMENT ...REQUIRES CONSIDERATION OF THE CHARACTER AND RECORD OF THE INDIVIDUAL OFFENDER AND THE CIRCUMSTANCES OF THE PARTICULAR OFFENSE...

(WOODSON V. NORTH CAROLINA, SUPRA, 428 U.S. AT 304, 96 S.CT. 2991, CITATION OMITTED;) AND

> A JURY MUST BE ALLOWED TO CONSIDER ON THE BASIS OF ALL RELEVANT EVIDENCE NOT ONLY WHY A DEATH SENTENCE SHOULD BE IMPOSED BUT ALSO WHY IT SHOULD NOT BE IMPOSED.

(JUREK V. TEXAS, SUPRA, 428 U.S. AT 271, 96 S.CT. AT 2956). SEE COMMONWEALTH V. MOODY, 9A - 11A INFRA.

> CONTRARY TO IMPLICATIONS IN THE DISSENTING OPINION ... WE DO NOT ASSUME THAT EVIDENCE OF AN OFFENDER'S PREVIOUS HISTORY AND BACKGROUND WOULD BE IRRELEVANT TO DETERMINING HIS MATURITY OR LACK THEREOF AT THE TIME OF THE KILLING. THE PROBLEM IS THAT, IN MAKING ITS ULTIMATE DETERMINATION OF WHETHER OR NOT MITIGATING CIRCUMSTANCES EXIST, THE JURY IS RESTRICTED BY THE STATUTE TO HIS STATUS OR SITUATION AT THE TIME OF THE KILLING.

COMMONWEALTH V. MOODY, INFRA AT 17A (EMPHASIS IN ORIGINAL). PETITIONER CAN FIND NO SUPPORT IN THE DECISIONS OF THIS COURT FOR THE STATE COURT'S CONCLUSION THAT THE MITIGATING CIRCUMSTANCES CANNOT BE STATUTORILY LIMITED TO THE DEFENDANT'S STATUS AT THE TIME OF THE COMMISSION OF THE MURDER.

ALTHOUGH THIS COURT, IN 1976, UPHELD THREE DEATH PENALTY STATUTES WHICH PROVIDED FOR A BROAD RANGE OF MITIGATING CIRCUMSTANCES TO BE PRESENTED TO THE SENTENCING AUTHORITY AND STRUCK DOWN TWO DEATH PENALTY STATUTES WHICH PROVIDED FOR MANDATORY IMPOSITION OF THE DEATH PENALTY WITHOUT ANY CONSIDERATION OF MITIGATING CIRCUMSTANCES, THESE FIVE POST-FURMAN[8] DECISIONS WERE NOT INTENDED BY THIS COURT TO BE EXHAUSTIVE OR DISPOSITIVE AS TO THE CONSTITUTIONALITY OF EVERY POSSIBLE SYSTEM GOVERNING THE IMPOSITION OF THE DEATH

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8 FURMAN V. GEORGIA, 408 U.S. 238, 92 S.CT. 2726 (1972).

PENALTY.[9] FOR THAT REASON, THE PENNSYLVANIA SUPREME COURT'S ATTEMPT TO EXTRAPOLATE FROM THOSE DECISIONS A DISPOSITIVE BASIS FOR JUDGING THE CONSTITUTIONALITY OF PENNSYLVANIA'S DEATH PENALTY STATUTE IS ERRONEOUS.

THE PENNSYLVANIA STATUTE DOES NOT PRESENT TO THIS COURT A SITUATION COMPARABLE TO THAT CONSIDERED BY THE COURT IN FURMAN V. GEORGIA, SUPRA; NOR IS IT ANALOGOUS TO THE POST-FURMAN DEATH PENALTY STATUTES WHICH THIS COURT HAS REVIEWED. RATHER, THE PENNSYLVANIA DEATH PENALTY STATUTE DIRECTLY PRESENTS TO THIS COURT A QUESTION WHICH REMAINS LARGELY UNANSWERED: WHETHER, IN WHAT CIRCUMSTANCES, AND TO WHAT EXTENT, A LEGISLATURE MAY CONSTITUTIONALLY DEFINE THE FACTORS TO BE CONSIDERED BY A SENTENCING AUTHORITY AS MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY? THE PENNSYLVANIA SUPREME COURT, IN STRIKING DOWN THE PENNSYLVANIA DEATH PENALTY

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9 IN GREGG V. GEORGIA, 428 U.S. AT 195, 96 S.CT. AT 2935-2936, THIS COURT STATED:

> WE DO NOT INTEND TO SUGGEST THAT ONLY THE ABOVE-DESCRIBED PROCEDURES WOULD BE PERMISSIBLE UNDER FURMAN OR THAT ANY SENTENCING SYSTEM CONSTRUCTED ALONG THESE GENERAL LINES WOULD INEVITABLY SATISFY THE CONCERNS OF FURMAN FOR EACH DISTINCT SYSTEM MUST BE EXAMINED ON AN INDIVIDUAL BASIS. RATHER, WE HAVE EMBARKED UPON THIS GENERAL EXPOSITION TO MAKE CLEAR THAT IT IS POSSIBLE TO CONSTRUCT CAPITAL-SENTENCING SYSTEMS CAPABLE OF MEETING FURMAN'S CONSTITUTIONAL CONCERNS.

(EMPHASIS ADDED, FOOTNOTES OMITTED.)

ACT, EFFECTIVELY HELD THAT THIS COURT'S DECISIONS CONSTITUTIONALLY PRECLUDE A LEGISLATURE FROM DEFINING OR LIMITING MITIGATING CIRCUMSTANCES. IT IS FOR THIS REASON THAT REVIEW BY THIS COURT IS REQUESTED.

THAT THIS COURT HAS UNDERTAKEN, IN CONNECTION WITH ITS REVIEW OF THE OHIO DEATH PENALTY STATUTE (BELL V. OHIO, 76-6513, AND LOCKETT V. OHIO, 76-6997, ARGUED JANUARY 17, 1978), TO CONSIDER LEGISLATIVE LIMITATIONS UPON THE MITIGATING CIRCUMSTANCES WHICH MAY BE PRESENTED TO A SENTENCING AUTHORITY, SUGGESTS THE LACK OF A PRIOR DEFINITIVE RESOLUTION OF THIS QUESTION. HOWEVER, RESOLUTION OF THAT QUESTION CANNOT BE SOLELY WITHIN THE CONTEXT OF THE OHIO STATUTE WHICH DIFFERS SUBSTANTIALLY FROM ITS PENNSYLVANIA COUNTERPART.[10] AS WAS SUGGESTED BY THIS COURT IN GREGG, SEE N.9, INFRA, "EACH DISTINCT SYSTEM MUST BE EXAMINED ON AN INDIVIDUAL BASIS."

UNLIKE OHIO AND MANY OTHER JURISDICTIONS, THE DEATH PENALTY MAY BE IMPOSED IN PENNSYLVANIA ONLY IF (1) THE DEFENDANT COMMITS A PREMEDITATED AND INTENTIONAL MURDER AND (2) THE MURDER WAS ACCOMPANIED BY AT LEAST ONE OF NINE (9) STATUTORILY SPECIFIED AGGRAVATING CIRCUMSTANCES AND (3) THE SENTENCING AUTHORITY EXPRESSLY FINDS THAT NONE OF THE SPECIFIED MITIGATING CIRCUMSTANCES EXIST. THUS, IF A MITIGATING CIRCUMSTANCE IS FOUND TO EXIST, THE DEFENDANT MUST BE SENTENCED TO LIFE IMPRISONMENT EVEN IF ALL NINE (9) AGGRAVATING CIRCUMSTANCES ARE ALSO FOUND TO EXIST.

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10 THE DIFFERENCES IN THE PENNSYLVANIA AND OHIO STATUTES THEMSELVES AND THE JUDICIAL GLOSS WHICH HAS BEEN PLACED UPON THOSE STATUTES ARE SUCH THAT NO ATTEMPT WILL BE MADE TO COMPARE THESE SCHEMES.

THE ONLY CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED IN PENNSYLVANIA IS FIRST DEGREE MURDER WHICH CONSTITUTES AN INTENTIONAL KILLING.[11] THUS, THE PENNSYLVANIA LEGISLATURE HAS NARROWLY CONFINED THE TYPE OF CRIME SUBJECT TO POSSIBLE IMPOSITION OF THE DEATH PENALTY. IN MOST OTHER JURISDICTIONS, AND CERTAINLY IN THOSE JURISDICTIONS REVIEWED BY THIS COURT, FELONY MURDER IS SUBJECT TO THE DEATH PENALTY.[12]

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[11] 18 PA.C.S.A. SECTION 2502 (SUPP. 1977-1978) CLASSIFIES MURDER AS FOLLOWS:

> (A) MURDER OF THE FIRST DEGREE.--A CRIMINAL HOMICIDE CONSTITUTES MURDER OF THE FIRST DEGREE WHEN IT IS COMMITTED BY AN INTENTIONAL KILLING.
>
> (B) MURDER OF THE SECOND DEGREE.--A CRIMINAL HOMICIDE CONSTITUTES MURDER OF THE SECOND DEGREE WHEN THE DEATH OF THE VICTIM OCCURRED WHILE DEFENDANT WAS ENGAGED AS A PRINCIPAL OR AN ACCOMPLICE IN THE PERPETRATION OF A FELONY.
>
> (C) MURDER OF THE THIRD DEGREE.--ALL OTHER KINDS OF MURDER SHALL BE MURDER OF THE THIRD DEGREE. MURDER OF THE THIRD DEGREE IS A FELONY OF THE FIRST DEGREE.

18 PA.C.S.A. SECTION 2502(D) (SUPP. 1977-1978) DEFINES AN INTENTIONAL KILLING AS A "KILLING BY MEANS OF POISON, OR BY LYING IN WAIT, OR BY ANY OTHER KIND OF WILLFUL, DELIBERATE AND PREMEDITATED KILLING."

[12] AN ACCOMPLICE IN A MURDER CASE, IN ORDER TO BE CONVICTED OF FIRST DEGREE MURDER, WOULD HAVE TO BE SHOWN TO HAVE ACTED WITH THE INTENT TO TAKE LIFE IN HIS ROLE AS AN ACCOMPLICE (18 C.P.S.A. §306(C) AND (D)). MOREOVER, WHILE THE COMMISSION OF AN INTENTIONAL KILLING, DURING THE PERPETRATION OF A FELONY, WOULD CONSTITUTE AN AGGRAVATING CIRCUMSTANCE, AN UNPREMEDITATED KILLING IN THE SAME SITUATION WOULD NOT CONSTITUTE FIRST DEGREE MURDER (18 PA.C.S.A. §2502(A); 18 PA.C.S.A. §1311(D)(1)(VI); 18 C.P.S.A. §306(C) AND (D)).

AFTER ANY CONVICTION FOR FIRST DEGREE MURDER, THE FOLLOWING STATUTORILY MANDATED PROCEDURE MUST BE UTILIZED:

> PROCEDURE AT SENTENCING HEARING.--AFTER SUCH VERDICT IS RECORDED AND BEFORE THE JURY IS PERMITTED TO SEPARATE, THE COURT SHALL PROCEED TO RECEIVE SUCH ADDITIONAL EVIDENCE NOT PREVIOUSLY RECEIVED FROM THE TRIAL AS MAY BE RELEVANT AND ADMISSIBLE UPON THE QUESTION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AND SHALL PERMIT SUCH ARGUMENT BY COUNSEL, AND DELIVER SUCH CHARGE THEREON AS MAY BE JUST AND PROPER IN THE CIRCUMSTANCES. AGGRAVATING CIRCUMSTANCES MUST BE PROVED BY A PREPONDERANCE OF THE EVIDENCE. THE JURY SHALL THEN RETIRE AND CONSIDER THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND RENDER SUCH VERDICT RESPECTING THEM AS THEY SHALL AGREE UPON. A FAILURE OF THE JURY TO AGREE UPON THE AGGRAVATING AND MITIGATING CIRCUMSTANCES SHALL NOT BE HELD TO IMPEACH OR IN ANY WAY AFFECT THE VALIDITY OF THE VERDICT ALREADY RECORDED, AND WHENEVER THE COURT SHALL BE OF THE OPINION THAT FURTHER DELIBERATION BY THE JURY WILL NOT RESULT IN AN AGREEMENT UPON THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, IT MAY, IN ITS DISCRETION, DISCHARGE THE JURY FROM FURTHER CONSIDERATION THEREOF, IN WHICH EVENT IF NO RETRIAL IS DIRECTED, THE COURT SHALL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT UPON THE VERDICT THERETOFORE RENDERED BY THE JURY AND RECORDED AS AFORESAID AND THE JURY SHALL BE SO INFORMED PRIOR TO THEIR DELIBERATIONS. THE COURT SHALL IMPOSE THE SENTENCE SO FIXED AS IN THE OTHER CASES.

18 PA.C.S.A. §1311(C).

THE STATUTORY PROVISION WHICH SPECIFIES THE AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED BY THE JURY AND THE EFFECT OF A JURY'S DETERMINATION OF THESE QUESTIONS IS AS FOLLOWS:

> (D) AGGRAVATING AND MITIGATING CIRCUMSTANCES.--IF A MURDER OF THE FIRST DEGREE IS ACCOMPANIED BY AT LEAST ONE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES AND NONE OF THE FOLLOWING MITIGATING CIRCUMSTANCES, THE PERSON CONVICTED SHALL BE SENTENCED TO DEATH. IF A MURDER OF THE FIRST DEGREE IS NOT ACCOMPANIED BY ANY OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES OR IS ACCOMPANIED BY AT LEAST ONE OF THE FOLLOWING MITIGATING CIRCUMSTANCES THE PERSON CONVICTED SHALL BE SENTENCED TO LIFE IMPRISONMENT:

(1) AGGRAVATING CIRCUMSTANCES:

(I) THE VICTIM WAS A FIREMAN, PEACE OFFICER OR PUBLIC SERVANT CONCERNED IN OFFICIAL DETENTION AS DEFINED IN SECTION 5121 OF THIS TITLE (RELATING TO ESCAPE), WHO WAS KILLED IN THE PERFORMANCE OF HIS DUTIES.

(II) THE DEFENDANT PAID OR WAS PAID BY ANOTHER PERSON OR HAD CONTRACTED TO PAY OR BE PAID BY ANOTHER PERSON OR HAD CONSPIRED TO PAY OR BE PAID BY ANOTHER PERSON FOR THE KILLING OF THE VICTIM.

(III)THE VICTIM WAS BEING HELD BY THE DEFENDANT FOR RANSOM OR REWARD, OR AS A SHIELD OR HOSTAGE.

(IV) THE DEATH OF THE VICTIM OCCURRED WHILE DEFENDANT WAS ENGAGED IN THE HIJACKING OF AN AIRCRAFT.

(V) THE VICTIM WAS A WITNESS TO A MURDER OR OTHER FELONY COMMITTED BY THE DEFENDANT AND WAS KILLED FOR THE PURPOSE OF PREVENTING HIS TESTIMONY AGAINST THE DEFENDANT IN ANY GRAND JURY OR CRIMINAL PROCEEDING INVOLVING SUCH OFFENSES.

(VI) THE DEFENDANT COMMITTED A KILLING WHILE IN THE PERPETRATION OF A FELONY.

(VII)IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.

(VIII)THE OFFENSE WAS COMMITTED BY MEANS OF TORTURE.

(IX) THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

(2) MITIGATING CIRCUMSTANCES:

(I) THE AGE, LACK OF MATURITY, OR YOUTH OF THE DEFENDANT AT THE TIME OF THE KILLING.

(II) THE VICTIM WAS A PARTICIPANT IN OR CONSENTED TO THE DEFENDANT'S CONDUCT AS SET FORTH IN SECTION 1311(D) OF THIS TITLE OR WAS A PARTICIPANT IN OR CONSENTED TO THE KILLING.

(III)THE DEFENDANT WAS UNDER DURESS ALTHOUGH NOT SUCH DURESS AS TO CONSTITUTE A DEFENSE TO PROSECUTION UNDER SECTION 309 OF THIS TITLE (RELATING TO DURESS).

18 PA.C.S.A. §1311(D).[13]

THIS IS ALSO A FAR MORE RESTRICTIVE APPROACH THAN HAS BEEN TAKEN IN OTHER JURISDICTIONS; THE FINDING OF A MITIGATING CIRCUMSTANCE OPERATES AS A BAR TO THE IMPOSITION OF THE DEATH PENALTY.[14]

IT IS EVIDENT THAT THE PENNSYLVANIA LEGISLATURE, IN ENACTING THE STATUTE, DID LIMIT THE EVIDENCE WHICH MIGHT BE CONSIDERED BY WAY OF MITIGATION. HOWEVER, THESE REASONABLE LIMITATIONS, WHEN VIEWED IN CONJUNCTION WITH THE SUBSTANTIALLY RESTRICTED PROFILE OF THE PERSONS WHO MAY BE SUBJECT TO THE DEATH PENALTY REGARDLESS OF MITIGATION, PRESENT A CONSTITUTIONALLY VALID SENTENCING SCHEME.

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[13] SECTION 309, REFERRED TO IN §1311(D)(2)(III), PROVIDES AS FOLLOWS:

DURESS

(A) GENERAL RULE.--IT IS A DEFENSE THAT THE ACTOR ENGAGED IN THE CONDUCT CHARGED TO CONSTITUTE AN OFFENSE BECAUSE HE WAS COERCED TO DO SO BY THE USE OF, OR A THREAT TO USE, UNLAWFUL FORCE AGAINST HIS PERSON OR THE PERSON OF ANOTHER, WHICH A PERSON OF REASONABLE FIRMNESS IN HIS SITUATION WOULD HAVE BEEN UNABLE TO RESIST.

(B) EXCEPTION.--THE DEFENSE PROVIDED BY SUBSECTION (A) OF THIS SECTION IS UNAVAILABLE IF THE ACTOR RECKLESSLY PLACED HIMSELF IN A SITUATION IN WHICH IT WAS PROBABLE THAT HE WOULD BE SUBJECTED TO DURESS. THE DEFENSE IS ALSO UNAVAILABLE IF HE WAS NEGLIGENT IN PLACING HIMSELF IN SUCH A SITUATION, WHENEVER NEGLIGENCE SUFFICES TO ESTABLISH CULPABILITY FOR THE OFFENSE CHARGED.

18 C.P.S.A. §309.

[14] THUS, EVEN THE DISCRETION OF A SENTENCING AUTHORITY TO WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES HAS BEEN REMOVED IN PENNSYLVANIA. SEE PROFFITT V. FLORIDA, 428 U.S. AT 257, 96 S.CT. AT 2969.

THE PENNSYLVANIA SUPREME COURT DID NOT EXPRESSLY CONSTRUE THE EXACT MEANING OF THE PENNSYLVANIA MITIGATING CIRCUMSTANCES PROVISION. IN RELEVANT PART, THAT COURT STATED:

> EVEN IF THIS LANGUAGE [THE MITIGATING CIRCUMSTANCES PROVISION] CAN BE CONSTRUED AS PERMITTING THE DEFENDANT TO PRESENT A BROAD RANGE OF MITIGATING EVIDENCE BEARING UPON HIS CHARACTER AND RECORD, THEREFORE, CLEARLY THE JURY, ABSENT CONSENT OR DURESS, CAN ONLY CONSIDER SUCH EVIDENCE, OR ANY OTHER RELEVANT EVIDENCE PRESENTED AT TRIAL, TO THE EXTENT IT SHOWS THE DEFENDANT'S AGE, YOUTH,[19] OR LACK OF MATURITY AT THE TIME OF THE KILLING. WE THUS CONCLUDE THAT EVEN IF IT IS LIBERALLY INTERPRETED [THE PENNSYLVANIA DEATH PENALTY STATUTE], UNLIKE THE TEXAS STATUTE APPROVED IN JUREK, DOES NOT PERMIT THE SENTENCING AUTHORITY IN MAKING ITS ULTIMATE DECISION TO FOCUS SUFFICIENTLY UPON THE ENTIRE CHARACTER AND RECORD OF THE OFFENDER.

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19 CONTRARY TO IMPLICATIONS IN THE DISSENTING OPINION ..., WE DO NOT ASSUME THAT EVIDENCE OF AN OFFENDER'S PREVIOUS HISTORY AND BACKGROUND WOULD BE IRRELEVANT TO DETERMINING HIS MATURITY OR LACK THEREOF AT THE TIME OF THE KILLING. THE PROBLEM IS THAT, IN MAKING ITS ULTIMATE DETERMINATION OF WHETHER OR NOT MITIGATING CIRCUMSTANCES EXIST, THE JURY IS RESTRICTED BY THE STATUTE TO HIS STATUS OR SITUATION AT THE TIME OF THE KILLING....

COMMONWEALTH V. MOODY, INFRA AT 17A, FOOTNOTE 20 OMITTED.

THUS, THE PENNSYLVANIA SUPREME COURT HAS STATED THAT, EVEN IF THIS PROVISION IS BROADLY INTERPRETED, SO AS TO ALLOW CONSIDERATION OF A WIDE RANGE OF FACTS BEARING UPON AGE, YOUTH, OR LACK OF MATURITY,[15] IT WOULD STILL FALL

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15 ALTHOUGH THE PENNSYLVANIA SUPREME COURT DID NOT SPECIFICALLY DEFINE THE PARAMETERS OF THE EVIDENCE WHICH COULD BEAR UPON "LACK OF MATURITY," THAT COURT DID STATE, IN N. 19, THAT "WE DO NOT ASSUME THAT EVIDENCE OF AN OFFENDER'S PREVIOUS HISTORY AND BACKGROUND WOULD BE IRRELEVANT TO DETERMINE HIS MATURITY OR LACK THEREOF AT THE TIME OF THE KILLING." ADDITIONALLY, IN N. 15, THE COURT STATED, "WE ASSUME, AS DID THE TRIAL COURT, WITHOUT DECIDING THAT 'AGE' IN THE STATUTE MEANS 'OLD AGE' BECAUSE OF ITS JUXTAPOSITION WITH 'YOUTH.'" COMMONWEALTH V. MOODY, INFRA AT 17A, 13A.

BECAUSE THE JURY IS RESTRICTED TO CONSIDERING MITIGATING CIRCUMSTANCES BEARING UPON A DEFENDANT'S STATUS OR SITUATION AT THE TIME OF THE KILLING. TO REQUIRE, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, THAT THE MITIGATING FACTORS MUST ENCOMPASS SOMETHING MORE THAN THE STATUS OF THE OFFENDER AT THE TIME OF THE KILLING HAS NO SUPPORT IN ANY OF THIS COURT'S OPINIONS. INDEED, ONLY THE DEFENDANT'S STATUS, STATE OF MIND, OR SITUATION AT THE TIME OF THE KILLING WOULD APPEAR TO BE RELEVANT TO THE QUESTION OF PENALTY. IF A THIRTY-FIVE YEAR OLD DEFENDANT HAD AN UPBRINGING WITH ANY NUMBER OF DEFICIENCIES WHEN HE WAS EIGHT YEARS OLD, SUCH FACTORS WOULD BE RELEVANT AND ADMISSIBLE UNDER THE PENNSYLVANIA STATUTE IF THEY HAD ANY IMPACT ON HIS STATUS OR SITUATION AT THE TIME OF THE COMMISSION OF THE KILLING. IF NO SUCH IMPACT EXISTED, SUCH EVIDENCE WOULD BE IRRELEVANT AS A MATTER OF LOGIC. THUS, THE PENNSYLVANIA COURT'S DECISION, THAT IT IS VIOLATIVE OF THE UNITED STATES CONSTITUTION TO RESTRICT MITIGATING CIRCUMSTANCES TO CIRCUMSTANCES AFFECTING THE DEFENDANT'S STATUS AT THE TIME OF THE KILLING, HAS NO BASIS IN ANY DECISION OF THIS COURT AND DOES NOT SUGGEST A NEW AND VIABLE CRITERION FOR STRIKING DOWN A DEATH PENALTY STATUTE.

THE PENNSYLVANIA STATUTE, BECAUSE IT SO NARROWLY LIMITS THE TYPE OF OFFENSE WHICH CAN EVEN TRIGGER CONSIDERATION OF THE DEATH PENALTY, PROVIDES AMPLE JUSTIFICATION FOR SIMILARLY PROVIDING THE JURY WITH CLEAR GUIDELINES AS TO WHAT FACTORS, AS A MATTER OF LEGISLATIVE POLICY, MAY BE CONSIDERED FOR PURPOSES OF MITIGATION. THE RANGE OF THE PENNSYLVANIA MITIGATING CIRCUMSTANCES PROVISION, WHICH ALLOWS THE JURY TO CONSIDER THE GENERAL CHARACTER AND BACKGROUND OF THE DEFENDANT, TO

ESTABLISH AGE, YOUTH, OR LACK OF MATURITY, DOES NOT EVEN RESEMBLE THE MANDATORY DEATH PENALTY STATUTE WHICH THIS COURT HAS DETERMINED TO BE UNCONSTITUTIONAL.[16]

IT IS ANOMALOUS TO CONCLUDE, AS THE PENNSYLVANIA SUPREME COURT HAS, THAT, ALTHOUGH A LEGISLATURE MAY SPECIFY THOSE FACTORS WHICH A JURY IS ALLOWED TO CONSIDER AS EVIDENCE OF AGGRAVATING CIRCUMSTANCES, IT IS ABSOLUTELY AND IRREVOCABLY BARRED FROM SIMILARLY SPECIFYING THOSE FACTORS WHICH MAY ESTABLISH MITIGATION. THE ONLY LIMITATION, WHICH SHOULD BE CONSTITUTIONALLY IMPOSED, IS THAT THE LEGISLATIVE DEFINITIONS OF AGGRAVATION AND MITIGATION BE REASONABLE. STATE LEGISLATURES SHOULD HAVE THE AUTHORITY TO PLACE REASONABLE BOUNDARIES ON THE MITIGATING FACTORS WHICH CAN BE CONSIDERED, ESPECIALLY WHERE, AS UNDER THE PENNSYLVANIA DEATH PENALTY STATUTE, THE FINDING OF ANY ONE OF THOSE MITIGATING FACTORS STATUTORILY BARS IMPOSITION OF THE DEATH PENALTY. THE PENNSYLVANIA SCHEME MORE CLOSELY COMPLIES WITH THE ORIGINAL DICTATES OF FURMAN THAN ANY OF THE STATUTES WHICH HAVE HERETOFORE BEEN CONSIDERED BY THIS COURT. ALTHOUGH PENNSYLVANIA HAS PERHAPS TAKEN A SOMEWHAT DIFFERENT APPROACH THAN THE FLORIDA, GEORGIA, AND TEXAS STATUTES PREVIOUSLY APPROVED BY THIS COURT, NOTHING CONTAINED IN ANY OF THIS COURT'S OPINIONS SUGGESTS THAT THAT APPROACH IS IMPERMISSIBLE.

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16 SEE ROBERTS V. LOUISIANA, SUPRA.

THE SOCIETAL IMPORTANCE OF THE DEATH PENALTY IS SO COMPELLING THAT, IF PETITIONER IS CORRECT IN ITS CONCLUSION THAT THE PENNSYLVANIA SUPREME COURT HAS MISCONSTRUED THIS COURT'S DECISIONS, IT IS ABSOLUTELY ESSENTIAL THAT PENNSYLVANIA NOT BE DENIED THE BENEFIT OF ITS LEGISLATURE'S APPROACH TO THE IMPOSITION OF THE DEATH PENALTY BECAUSE OF AN ERRONEOUS STATE COURT INTERPRETATION OF FEDERAL LAW.[17] ADDITIONALLY, THIS CASE PRESENTS QUESTIONS, PREVIOUSLY UNRESOLVED BY THIS COURT, WHICH EFFECT OTHER JURISDICTIONS AS WELL AS PENNSYLVANIA.

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17 THE PENNSYLVANIA COURT'S SOLE RELIANCE UPON FEDERAL CONSTITUTIONAL GROUNDS IN STRIKING DOWN THE DEATH PENALTY STATUTE IS CLEAR. THE COURT'S RELIANCE UPON THE DICTATES OF THE EIGHTH AND FOURTEENTH AMENDMENTS IS APPARENT FROM BOTH THE MAJORITY OPINION AND FROM MR. JUSTICE NIX'S STATEMENT, IN HIS DISSENTING OPINION, THAT HIS DISSENT IS BASED SOLELY UPON THE COURT'S RELIANCE ON FEDERAL CONSTITUTIONAL GROUNDS. COMMONWEALTH V. MOODY, INFRA AT 21A.

II. EVEN IF THE PENNSYLVANIA MITIGATING CIRCUMSTANCES PROVISION COULD OTHERWISE BE CONSIDERED UNDULY RESTRICTIVE, A DEATH SENTENCE WHICH IS IMPOSED UPON A DEFENDANT SERVING A LIFE SENTENCE AT THE TIME OF THE COMMISSION OF THE RELEVANT OFFENSE IS VALID UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

THE CIRCUMSTANCES OF THIS CASE ARE SUCH THAT REVIEW IS ALSO REQUESTED AS TO A QUESTION WHICH THIS COURT HAS EXPRESSLY RESERVED FOR CONSIDERATION: WHETHER THE EXISTING CONSTITUTIONAL GUIDELINES FOR THE IMPOSITION OF THE DEATH PENALTY ARE APPLICABLE WHERE THE DEFENDANT, AT THE TIME OF THE KILLING, WAS SERVING A LIFE SENTENCE.[18] RESPONDENT, AT THE TIME HE COMMITTED THE CRIME FOR WHICH HE WAS SENTENCED TO DEATH, WAS SERVING NOT ONE BUT SEVEN (7) LIFE SENTENCES. ALTHOUGH THE PENNSYLVANIA SUPREME COURT WAS REQUESTED BY THE COMMONWEALTH TO REVIEW THE CONSTITUTIONALITY OF THE PENNSYLVANIA MITIGATING CIRCUMSTANCES IN THAT SPECIFIC SITUATION; NAMELY, WHERE AN EXISTENT AGGRAVATING CIRCUMSTANCE WAS THAT THE DEFENDANT WAS SERVING A LIFE SENTENCE; THE COURT DECLINED TO CONSIDER THAT QUESTION AND STATED AS FOLLOWS:

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18 IN ROBERTS V. LOUISIANA, SUPRA AT N. 9, 428 U.S. AT 334, 96 S.CT. AT 3006-3007, THIS COURT STATED:

> 9. ONLY THE THIRD CATEGORY OF THE LOUISIANA FIRST-DEGREE MURDER STATUTE, COVERING INTENTIONAL KILLING BY A PERSON SERVING A LIFE SENTENCE OR BY A PERSON PREVIOUSLY CONVICTED OF AN UNRELATED MURDER, DEFINES THE CAPITAL CRIME AT LEAST IN SIGNIFICANT PART IN TERMS OF THE CHARACTER OR RECORD OF THE INDIVIDUAL OFFENDER. ALTHOUGH EVEN THIS NARROW CATEGORY DOES NOT PERMIT THE JURY TO CONSIDER POSSIBLE MITIGATING FACTORS, A PRISONER SERVING A LIFE SENTENCE PRESENTS A UNIQUE PROBLEM THAT MAY JUSTIFY SUCH A LAW. SEE GREGG V. GEORGIA, ANTE, ___ U.S. P. ___, 96 S.CT. P. 2931; WOODSON V. NORTH CAROLINA, ANTE, ___ U.S. P. ___ N. 7; ___ N. 25, 96 S.CT. P. 2983 N. 7, 2985 N. 25.

(EMPHASIS ADDED.)

FINALLY, THE COMMONWEALTH NOTES THAT THE PLURALITY OF THE UNITED STATES SUPREME COURT HAS EXPRESSLY RESERVED THE QUESTION OF WHETHER A PRISONER ALREADY SERVING A LIFE SENTENCE MAY BE SUBJECT TO A MANDATORY DEATH PENALTY. SEE HARRY ROBERTS V. LOUISIANA, SUPRA. THE COMMONWEALTH THEREFORE CONTENDS THAT, SINCE MOODY WAS SERVING SEVEN CONSECUTIVE LIFE SENTENCES AT THE TIME OF PRICE'S KILLING, HE MAY CONSTITUTIONALLY BE SENTENCED TO DEATH REGARDLESS OF ANY GENERAL CONSTITUTIONAL DEFECTS IN SECTION 1311 RELATING TO MITIGATING CIRCUMSTANCES. THE QUESTION, HOWEVER, OF A MANDATORY DEATH SENTENCE FOR A MURDERER ALREADY SERVING A LIFE SENTENCE IS NOT PROPERLY BEFORE US, SINCE SECTION 1311 DOES NOT MAKE DEATH MANDATORY IN SUCH CIRCUMSTANCES.[21]

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21 WE NOTE ALSO THAT MOODY WAS NOT SERVING A PENNSYLVANIA LIFE SENTENCE AT THE TIME OF PRICE'S KILLING, AND THAT AT THE TIME OF HIS CONVICTION INSTANTLY HIS SENTENCES IN THE DISTRICT OF COLUMBIA WERE STILL ON APPEAL.

COMMONWEALTH V. MOODY, 20A -21A INFRA.

THE PENNSYLVANIA SUPREME COURT MISCONSTRUED THE QUESTION PRESENTED.[19] THE QUESTION PRESENTED BY THIS CASE IS WHETHER, FOR FEDERAL CONSTITUTIONAL PURPOSES, THE PENNSYLVANIA MITIGATING CIRCUMSTANCES ARE UNDULY RESTRICTIVE WHERE, AND ONLY WHERE, THE STATUTORILY PROVIDED AGGRAVATING CIRCUMSTANCE, THAT THE DEFENDANT WAS SERVING A LIFE SENTENCE AT THE TIME OF THE CRIME, IS FOUND TO EXIST.

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19 THE COURT'S RELIANCE, IN FOOTNOTE 21, UPON (1) THE FACT THAT RESPONDENT WAS NOT SERVING A PENNSYLVANIA LIFE SENTENCE AT THE TIME OF THE KILLING, AND (2) THE FACT THAT THE CONVICTIONS FOR THE SEVEN (7) LIFE SENTENCES WERE STILL ON APPEAL IS MEANINGLESS UNDER THE EXPRESS PROVISIONS OF THE STATUTE ITSELF. THE NINTH AGGRAVATING CIRCUMSTANCE IS AS FOLLOWS:

> THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

18 PA.C.S.A. §1311(D)(IX) (SUPP. 1977-1978). THUS, THE FACTORS AND CONSIDERATIONS NOTED BY THE PENNSYLVANIA SUPREME COURT IN FOOTNOTE 21 ARE IRRELEVANT.

THE PENNSYLVANIA SUPREME COURT'S CONCLUSION, THAT THIS QUESTION IS NOT PRESENT BECAUSE A DEATH SENTENCE IS NOT STATUTORILY MANDATED IN SUCH CIRCUMSTANCES, QUITE SIMPLY MISSES THE POINT.[20] THE COMMONWEALTH, BY NOTING THAT THIS COURT HAS LEFT OPEN THE QUESTION OF WHETHER A MANDATORY DEATH SENTENCE CAN BE IMPOSED WHERE A DEFENDANT IS SERVING A LIFE SENTENCE, WAS NOT SUGGESTING THAT PENNSYLVANIA COULD SO APPLY ITS OWN STATUTE. RATHER, THE COMMONWEALTH WAS SUGGESTING THAT THE ENTIRE QUESTION OF THE ADEQUACY OF THE PENNSYLVANIA MITIGATING CIRCUMSTANCES HAD TO BE REVIEWED IN THIS CASE UNDER SUBSTANTIALLY DIFFERENT STANDARDS THAN THOSE ENUNCIATED IN FURMAN, SUPRA, AND ITS PROGENY, BECAUSE THOSE CASES DID NOT NECESSARILY APPLY WHERE A LIFE PRISONER WAS INVOLVED.

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20 THE PENNSYLVANIA SUPREME COURT DID NOT REFUSE TO REACH THIS ISSUE ON THE BASIS OF SEVERABILITY CONSIDERATIONS. INDEED, THE APPLICABLE SEVERABILITY CLAUSE READS AS FOLLOWS:

> SECTION 3.
>
> IF ANY PROVISION OF THIS ACT OR THE APPLICATION THEREOF TO ANY PERSON OR CIRCUMSTANCES IS HELD INVALID, SUCH INVALIDITY SHALL NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THE ACT WHICH CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS ACT ARE DECLARED TO BE SEVERABLE.

18 C.P.S.A. SECTION 3. IF, BECAUSE OF THE PLAIN LANGUAGE OF THE SEVERABILITY CLAUSE, THE PENNSYLVANIA DEATH PENALTY STATUTE CAN BE APPLIED CONSTITUTIONALLY ONLY WHERE THE DEFENDANT IS A LIFE PRISONER, THAT "APPLICATION" MUST BE SAVED REGARDLESS OF WHETHER, UNDER ANY OTHER AGGRAVATING CIRCUMSTANCE, A DEFENDANT COULD NOT BE SUBJECT TO THE DEATH PENALTY.

PETITIONER, AS IT URGED THE PENNSYLVANIA SUPREME COURT, URGES THIS COURT TO CONSIDER THE ADEQUACY OF PENNSYLVANIA'S MITIGATING CIRCUMSTANCES WHERE, AS HERE, AN EXISTENT AGGRAVATING CIRCUMSTANCE WAS RESPONDENT'S LIFE PRISONER STATUS. AS THIS COURT HAS EXPRESSLY RESERVED DECISION ON THE QUESTION OF WHETHER MANDATORY IMPOSITION OF THE DEATH PENALTY IS CONSTITUTIONAL IN THIS LIMITED CONTEXT, PETITIONER SUBMITS THAT THE PENNSYLVANIA MITIGATING CIRCUMSTANCES ARE FAR BROADER THAN THE CONSTITUTION REQUIRES. ACCORDINGLY, RESPONDENT MOODY'S SENTENCE OF DEATH WAS PROPERLY IMPOSED.

CONCLUSION

For all the foregoing reasons, Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

STEVEN H. GOLDBLATT
Deputy District Attorney for Law

GAELE McLAUGHLIN BARTHOLD
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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA : OCTOBER TERM, _____
Petitioner

v. :

THEODORE MOODY : NO. _____
Respondent

CERTIFICATION OF SERVICE

I, STEVEN H. GOLDBLATT, ESQUIRE, Counsel for Petitioner, Commonwealth of Pennsylvania, hereby certify that I have caused a copy of this Petition for a Writ of Certiorari to be served upon JOHN ROGERS CARROLL, ESQUIRE, and JOSEPH D. MONTGOMERY, III, ESQUIRE, Counsel for Respondent, THEODORE MOODY, by depositing three copies in the United States Mail, First Class, Postage Prepaid, addressed to JOHN ROGERS CARROLL, ESQUIRE, 326 Three Penn Center, Philadelphia, Pennsylvania, 19102, and three copies in the United States Mail, First Class, postage prepaid, addressed to JOSEPH D. MONTGOMERY, III, ESQUIRE, Two Girard Plaza, Tenth Floor, Philadelphia, Pennsylvania, 19102, on Friday, February 24, 1978.

STEVEN H. GOLDBLATT

[J. 178]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant
v.
THEODORE MOODY

No. 280 JANUARY TERM 1977

Appeal from the Order of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, at No. 1429 February Sessions, 1975.

Entered: January 28, 1977

OPINION

EAGEN, C. J.

FILED: November 30, 1977

In this appeal by the Commonwealth we are asked to determine the constitutionality of section 1311 of the Sentencing Code, 18 Pa. C.S.A. §1311 (Supp. 1977-78), which establishes sentencing procedures and standards regulating jury determinations of whether or not the death penalty should be imposed as punishment for murder, and which a panel of the Court of Common Pleas of Philadelphia held to be unconstitutional. We shall affirm.

I

Appellee Theodore Moody was convicted by a jury of murder of the first degree and criminal conspiracy in the death on December 29, 1974, of one James Price, a fellow inmate at Holmesburg Prison in Philadelphia. Pursuant to section

1311(c) of the Sentencing Code,[1] a hearing was then held to permit the jury to receive additional testimony and arguments on the question of aggravating and mitigating circumstances. In order to establish aggravating circumstances, the Commonwealth called an assistant United States attorney from Washington, D. C., who testified that Moody had previously been convicted in the District of Columbia of seven counts of premeditated and deliberate first-degree murder and seven counts of first-degree felony-murder, and that he had been sentenced to a term of twenty years to life imprisonment on each count.[2]

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1 "Procedure at sentencing hearing.-- After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received from the trial as may be relevant and admissible upon the question of aggravating and mitigating circumstances and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. Aggravating circumstances must be proved beyond a reasonable doubt. Mitigating circumstances must be proved by a preponderance of the evidence. The jury shall then retire and consider the aggravating and mitigating circumstances and render such verdict respecting them as they shall agree upon. A failure of the jury to agree upon the aggravating and mitigating circumstances shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of the opinion that further deliberation by the jury will not result in an agreement upon the aggravating and mitigating circumstances, it may, in its discretion, discharge the jury from further consideration thereof, in which event if no retrial is directed, the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury and recorded as aforesaid and the jury shall be so informed prior to their deliberations. The court shall impose the sentence so fixed as in the other cases."

2 Section 1311(d)(1)(ix) lists the following

During cross-examination the witness testified that Moody's appeals attacking these convictions were still pending. The Commonwealth also argued to the jury that the evidence adduced at trial indicated the killing of Price was "committed by means of torture," another statutory aggraving circumstance.[3] In an effort to establish statutory mitigating circumstances, the defense called Moody's mother,

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2 Continued

statutory aggravating circumstance:

> "The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense."

Moody's previous murder convictions had been based upon the deaths of seven persons in the highly publicized Hanafi Muslim killings of January 16, 1973. His confinement in Holmesburg Prison at the time of the instant murder was unrelated to these convictions. During the instant trial, however, the Commonwealth presented evidence that the victim, Price, had given a statement to the police and grand jury testimony implicating Moody in the District of Columbia killings, and that Moody had been aware that Price had implicated him.

3 18 Pa. C.S.A. §1311(d)(1)(viii).

who testified to her son's age--twenty-one at the time of the killing--and her belief that he was not "quite mature" and that he was "easily led."[4] After further deliberations the jury returned with a finding that the killing of Price was accompanied by aggravating circumstances and no mitigating circumstances. Although this finding required the imposition of the death penalty,[5] the court deferred formal sentencing pending the disposition of post-verdict motions.

Subsequently, a three-judge post-verdict motions court denied Moody's motions in arrest of judgment and for a new trial, but a majority of that court concluded that to impose the death penalty on Moody would be unconstitutional on two grounds. First, the statutory mitigating circumstances were found "unconstitutionally vague because a reasonable jury would have to guess at the meaning of 'age', 'youth' and 'lack of maturity,'" with "arbitrary and caprious decisions . . . an inevitable result." Second, the court concluded that because at the time of Moody's trial this Court had promulgated no procedural rules for imposition of the death penalty by trial courts

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4 Section 1311(d)(2)(i) lists as mitigating "[t]he age, lack of maturity, or youth of the defendant at the time of the killing."

5 "Aggravating and mitigating circumstances.--If a murder of the first degree is accompanied by at least one of the following aggravating circumstances and none of the following mitigating circumstances, the person convicted shall be sentenced to death. If a murder of the first degree is not accompanied by any of the following aggravating circumstances or is accompanied by at least one of the following mitigating circumstances, the person convicted shall be sentenced to life imprisonment . . . ." 18 Pa. C.S.A. §1311(d).

in non-jury trials or guilty-plea proceedings,[6] trial courts had no power to impose the death penalty in such contexts, and that therefore, pursuant to United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209 (1968), the imposition of the death penalty after a jury trial "placed a chilling and unconstitutional burden upon the exercise of the constitutional right to trial by jury." One judge concurred solely on the Jackson ground. The court certified that its decision on the death penalty involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate determination of the matter, and it stayed all proceedings meanwhile; we allowed the appeal.[7]

In addition to arguing in support of the grounds advanced by the post-verdict motions court for holding imposition of the death penalty unconstitutional, Moody also urges, as he did below, that section 1311 unconstitutionally restricts the evidence the jury may consider in mitigation of the penalty. We agree. Accordingly, in affirming the order of the Court of Common Pleas, we do not reach the grounds which that court found decisive.[8]

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6 "Guilty pleas and non-jury trials.--In cases of pleas of guilty, or trial by court, the court shall impose sentence in accordance with Rules of Criminal Procedure as promulgated by the Supreme Court of Pennsylvania." 18 Pa. C.S.A. §1311(e).

7 See Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, No. 223, Art. V, §501(b); 17 P.S. §211.501(b)(Supp. 1977-78). The only issues involved in the present appeal are those relating to the constitutionality of the death penalty. The Attorney General of Pennsylvania has intervened and filed a brief in support of the Commonwealth's position; the American Civil Liberties Union, greater Philadelphia branch, and the American Civil Liberties Foundation of Pennsylvania have filed an Amicus Curiae brief in support of Moody.

8 Moody also contends that imposition of the death

II

In Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972), this Court recognized that the Supreme Court of the United States, by its decision in Furman v. Georgia, 408 U.S. 238, 97 S.Ct. 2726 (1972), had in effect invalidated Pennsylvania's prior death-penalty statute[9] as violative of the Eighth and Fourteenth Amendments. Section 1311 was enacted in 1974 [10] by the Pennsylvania legislature in an effort to cure what were perceived to be the constitutional defects of the invalidated statute. See Commonwealth ex rel. Fitzpatrick v. Bullock, Pa. , 370 A.2d 309 (1977).

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8 Continued

penalty is a per se violation of Art. I, §13, of the Pennsylvania Constitution, which proscribes the infliction of "cruel punishments." This contention was not advanced below and is asserted on appeal in response to the appellant Commonwealth's argument that the death penalty does not per se violate the Pennsylvania Constitution. In view of our disposition of this appeal, we do not reach this issue.

9 Act of June 24, 1939, P.L. 872, §701, as amended, 18 P.S. §4701. At the time it decided Furman, the Supreme Court in fact vacated two death sentences imposed pursuant to this statute. Phelan v. Brierley, 408 U.S. 939, 92 S.Ct. 2875 (1972); Scoleri v. Pennsylvania, 408 U.S. 934, 92 S.Ct. 2852 (1972). See Commonwealth v. Martin, 465 Pa. 134, 348 A.2d 391 (1975).

10 Act of December 6, 1972, P.L. 1482, No. 334, §1311, added March 26, 1974, P.L. 213, No. 46, §3, imd. effective. On December 30, 1974, the section was reenacted without change and made part of the new Sentencing Code. Section 1102 of the Crimes Code, enacted on December 6, 1972, and effective on June 6, 1973, had merely provided that "[a] person who has been convicted of a murder of the

Section 1311 retains the split-verdict provisions of the previous statute; that is, if the jury finds the defendant guilty of murder of the first-degree, it then proceeds to hear additional evidence and arguments and to render a separate verdict with regard to the penalty. The new statute, however, in an effort to avoid the untrammeled discretion and lack of standards for determining the penalty condemned in Furman [11] both limits the death penalty to murders of the first degree which the jury finds to be accompanied by at least one of nine specified aggravating circumstances and by none of three specified mitigating circumstances and requires that it be imposed when such a finding is made. The statute also provides that aggravating circumstances must be proved beyond a reasonable doubt and mitigating circumstances by a preponderance of the evidence and further provides for automatic review by this Court of all death sentences. See 18 Pa. C.S.A. §1311(g). The result clearly is to reduce substantially the scope of discretion in jury determinations of the penalty for murder of the first degree.

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10 Continued

first degree shall be sentenced to death or to a term of life imprisonment" without establishing any procedures or standards to be utilized in determining the appropriate sentence. 18 Pa. C.P.S.A. §1102. On March 26, 1974, section 1102 was amended to conform with the new section 1311. 18 Pa. C.P.S.A. §1102 (Supp. 1977-78).

11

Because the per curiam decision in Furman merely held that the statutes there at issue were unconstitutional, with the five justices who concurred in the result each writing a separate opinion and not joining in any of the others, the full meaning and scope of that decision were difficult to discern. Of the approximately 35 states that enacted new death-penalty legislation in response to Furman, over half adopted

III

Last year the United States Supreme Court addressed itself for the first time to the constitutionality of death-penalty statutes enacted subsequent to Furman. In a series of five decisions announced on the same day, that Court found the new statutes of Georgia, Texas, and Florida constitutional and invalidated statutes from North Carolina and Louisiana.[12] None of the statutes there involved corresponds precisely with the Pennsylvania statute here at issue, but we must look to these decisions, as well as to subsequent pronouncements by the Supreme Court, for guidance in determining the constitutionality of section 1311. Our task is complicated by the fact that no clear majority view with regard to ascertaining the constitutionality of a capital-punishment statute has emerged from these decisions. Justices Brennan and Marshall would have invalidated all five of the statutes at issue in the 1976 cases because of their consistently-expressed view that the death penalty in all circumstances constitutes cruel and unusual punishment. Chief Justice Burger and Justices White, Blackmun, and Rehnquist would have found all five constitutional. The decisions of the Court were thus controlled by a "plurality" consisting of Justices Stewart, Powell, and Stevens which in each case constituted part of the decisional majority with one of these justices writing the opinion announcing the judgment of the Court. The conclusion which emerges from these decisions is that the death penalty as a punishment for murder is not, at least at present, inevitably cruel and unusual punishment in violation of the Eighth Amendment,[13]

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11 Continued

mandatory death penalties for specified crimes, while the rest adopted statutes providing for various forms of limited discretion. Rockwell v. Superior Court, 18 Cal. 3rd 420, 134 Cal. Rptr. 650, 556 P.2d 1101, 1118 (1976) (Concurring Opinion, Clark, J.)

12

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950

but that a statute authorizing capital punishment for even a narrowly-limited category of murder violates the Eighth Amendment if it does not sufficiently permit the sentencing authority in determining the sentence to take into account the particular circumstances of the crime and the individual history and character of the criminal. See Harry Roberts v. Louisiana, U.S. , 97 S.Ct. 1993 (1977).

The Supreme Court plurality in effect appears to have discerned an element of due process in the Eighth Amendment which is applicable to sentencing in capital cases.[14] Thus, in the words of Mr. Justice Stewart:

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12 Continued

(1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001 (1976).

13 In Coker v. Georgia, U.S. , 97 S.Ct. 2861 (1977), a majority of the Court concluded that death in all circumstances is cruel and unusual punishment for the crime of rape.

14 See Comment, Resurrection of Capital Punishment--The 1976 Death Penalty Cases, 81 Dickinson Law Rev. 543, 564-66 (1977). In McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454 (1971), a majority of the Supreme Court had held that the absence of sentencing standards or bifurcated proceedings in capital cases did not violate due process. But see Gardner v. Florida, U.S. , 97 S.Ct. 1197 (1977), in which at least five justices concluded that the failure of a trial judge to make available to the defendant and his counsel a confidential sentencing report which the judge utilized in determining that the death penalty should be imposed violated due process.

"This Court has previously recognized that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' Pennsylvania v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See Williams v. New York, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949); Furman v. Georgia, 408 U.S., at 402-403, 92 S.Ct.,at 2810-2811 (Burger, C.J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v. Dulles, 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

"This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however, long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." [Footnote omitted.]

Woodson v. North Carolina, supra, 428 U.S. at , 96 S.Ct. at 2991-92. Moreover, as stated by Mr. Justice Stevens:

> ". . . a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in Woodson v. North Carolina, post, U.S. , pp. , 96 S.Ct. , pp. 2991-2992, 48 L.Ed. 2d , to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in Woodson and Roberts v. Louisiana, post. A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." [Footnote omitted.] [Emphasis added.]

Jurek v. Texas, supra, 428 U.S. at , 96 S.Ct. at 2956.

We must determine, therefore, whether section 1311 permits the jury to consider sufficiently "the character and record of the individual offender" and, in particular, whether it permits the jury to consider "on the basis of all relevant evidence" why a death sentence should not be imposed. Plainly, unlike the mandatory North Carolina and Louisiana statutes struck down by the Supreme Court, the Pennsylvania statute does permit the jury in determining punishment to go beyond the crime itself and consider some mitigating circumstances. For this reason, the Commonwealth would have us uphold section 1311 as essentially similar to the Georgia, Florida, and Texas statutes the Court found constitutional. Clearly in bifurcating the guilt and penalty phase of the trial, in limiting the death penalty to murders of the first degree attended by

specific aggravating circumstances, and in providing for automatic appellate review of all death sentences, the legislature has adopted procedures for the protection of defendants in capital cases which have been specifically approved and endorsed by the Supreme Court. See Gregg v. Georgia, supra; Proffitt v. Florida, supra. In our view, however, the constitutional defect of section 1311 is that, unlike the statutes approved by the Supreme Court, it so narrowly limits the circumstances which the jury may consider mitigating that it precludes the jury from a constitutionally adequate consideration of the character and record of the defendant.

Section 1311(d) limits the circumstances which the jury is to consider mitigating to "the following circumstances" and lists three:

> "(2) Mitigating circumstances:
>
> (i) The age, lack of maturity, or youth of the defendant at the time of the killing.
>
> (ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.
>
> (iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress)."

Of the three listed, only subsection (d)(2)(i) can be said to focus the jury's attention upon the character and record of the defendant as opposed to the circumstances of the crime, and that only to the limited extent of determining his age, lack of maturity, or youth at the time of the killing. Although a prior conviction for an offense punishable by life imprisonment is an aggravating circumstance, the absence of a prior criminal record or even

positive achievements or good works cannot be considered as mitigating. Whatever the offender's potential for rehabilitation, his life is to be terminated without consideration of it unless his status or situation at the time of the killing can be found to be a mitigating circumstance.[15]

In contrast, the statute approved in Gregg v. Georgia, supra, while limiting the sentencing authority's power to impose the death penalty for murder to situations in which it finds beyond a reasonable doubt at least one statutory aggravating circumstance, does not even mention specific mitigating circumstances other than the absence of prior convictions; in directing the sentencing authority to weigh aggravating and mitigating factors, it thus gives defendant and sentencing authority wide latitude as to the type of mitigating evidence he may present and it may consider, and a recommendation of mercy by the jury is binding upon the trial court without any finding of a specific mitigating circumstance. With regard to jury determinations of the penalty, the Supreme Court plurality emphasized that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die" if the jury is to fulfill its role in capital cases of maintaining "'a link between contemporary values and the penal system.'" Id., 428 U.S. at , 96 S.Ct. at 2933, quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15, 88 S.Ct. 1770, 1775 n. 15 (1968). Further, the plurality in Gregg expressly indicated that, so long as the defendant is not prejudiced thereby, it is preferable not to impose restrictions on the evidence and arguments presented to the jury at the penalty hearing; it also indicated that the possibility of a jury affording mercy to a particular defendant did not render the procedure unconstitutionally arbitrary.

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15 We assume, as did the trial court, without deciding that "age" in the statute means "old age" because of its juxtaposition with "youth."

The Florida statute approved in Proffitt v. Florida, supra, lists seven mitigating circumstances, significantly including "[t]he defendant has no significant history of prior criminal activity," which are to be weighed against eight statutory aggravating circumstances. In addition, however, the plurality noted that the Florida statute does not limit the mitigating factors which may be considered by the sentencing authority to the statutory mitigating circumstances. Id., 428 U.S. at n.8, 96 S.Ct. at 2965 n.8. Further, since the jury's penalty verdict in Florida is only advisory, the judge in sentencing the defendant may also make use of a presentence investigation report, which may also present mitigating factors relevant to the offender's character and record. Id., 428 U.S. at n. 9, 96 S.Ct. at 2966 n. 9. See also Gardner v. Florida, supra. Thus, in Florida also there appears to be essentially no limitation on the mitigating factors which the defendant may have the sentencing authority consider.

The Commonwealth argues that section 1311 is actually more favorable to offenders in that it mandates a life sentence if the jury finds a mitigating circumstance,while the Georgia and Florida statutes allow the imposition of the death penalty if the aggravating circumstances outweigh the mitigating circumstances. This distinction, however, is helpful only if the defendant is able to establish one of the narrow mitigating circumstances mentioned in section 1311(d). Gregg and Proffitt suggest, rather, that the sentencing authority must be given the opportunity to weigh and consider in mitigation whatever evidence might be relevant to passing an informed judgment upon the defendant.[16]

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16 The Commonwealth also points out that the sentencing scheme of section 1311 derives from the Model Penal Code, which was quoted with approval by the Gregg plurality, and urges that the mitigating circumstances in section 1311 are essentially the same as those found in the Model Code. The Commonwealth, however, overlooks the fact that the Model

This view is fortified by an examination of Jurek v. Texas, supra. The Texas statute there approved limits capital-murder to five situations, which the plurality concluded were comparable to the aggravating circumstances specified by Georgia and Florida. After a defendant is convicted of capital-murder in Texas, a sentencing proceeding follows during which the jury is required to answer three questions based upon the evidence it has heard. For the death penalty to be imposed, the state must prove beyond a reasonable doubt that the answer to each question is yes. One of these questions, which in effect raise the issue of mitigating circumstances, focuses upon the character and record of the defendant. The jury is thereby asked to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." In finding the Texas statute constitutional, the plurality strongly emphasized that the Texas Court of Criminal Appeals interpreted this question to permit the defendant to present to the jury whatever mitigating evidence he can adduce:

> "Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital-murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it.

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16 Continued

Code not only specifies a broader range of mitigating circumstances, but it also permits the jury to consider additional evidence in mitigation as well as that relevant to the specified mitigating circumstances. It forbids imposition of the death penalty unless the jury finds a specified aggravating circumstance and "that there are no substantial mitigating factors." Model Penal Code, §201.6 (Tentative Draft No. 9, 1959).

* * * *

> "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."

Id., 428 U.S. at , 96 S.Ct. at 2957-58.

We thus conclude that what is now constitutionally required with regard to the scope of the evidence in mitigation which may be considered by the jury is essentially similar to what had long been Pennsylvania law in capital cases.[17] As Mr. Justice (later Chief Justice) Benjamin R. Jones put it in Commonwealth v. Green, 396 Pa. 137, 148, 151 A.2d 241, (1959):

> "The imposition of the death penalty by a judicial tribunal should be made only when it is the sole penalty justified both by the criminal act and the criminal himself and then only after a full and exhaustive inquiry into both the criminal act and the criminal himself. Time and again in referring to the duty of juries in fixing the penalty between death and life imprisonment we have insisted that the jury exercise its discretion only after it has considered all the evidence, culpatory and exculpatory, incriminating and extenuating, including what manner of man the criminal is and has been." [Citations omitted.] [Emphasis in original.]

Thus, in our view, in order to protect a defendant from cruel and unusual punishment in a capital case, it is now necessary both that the aggravating circumstances that will justify the imposition of the death penalty be clearly defined for the sentencing authority, and that the sentencing authority be allowed to consider whatever mitigating evidence relevant to his character and record the defendant can present.

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17 In non-capital cases, compare Commonwealth v.

IV

The Commonwealth argues that section 1311 may be liberally interpreted to permit the defendant to introduce a broad range of mitigating evidence at the penalty hearing. Section 1311(c) provides that "the court shall proceed to receive such additional evidence not previously received from the trial as may be relevant and admissible upon the question of aggravating and mitigating circumstances," but section 1311(d) expressly limits mitigating circumstances to "the following."[18] Even if this language can be construed as permitting the defendant to present a broad range of mitigating evidence bearing upon his character and record, therefore, clearly the jury, absent consent or duress, can only consider such evidence, or any other relevant evidence presented at trial, to the extent it shows the defendant's age, youth, or lack of maturity at the time of the killing.[19] We thus conclude that,

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17 Continued

Riggins, Pa. , A.2d (1977) (J. 154, filed August 17, 1977); Commonwealth v. Martin, 466 Pa. 118, 351 A.2d 650 (1976).

18 In contrast, the Act of 1939 as amended provided that "the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant." [Emphasis added.] 18 P.S. §4701.

19 Contrary to implications in the dissenting opinion of Mr. Justice Nix, we do not assume that evidence of an offender's previous history and background would be irrelevant to determining his maturity or lack thereof at the time of the killing. The problem is that, in making its ultimate determination of whether or not mitigating circumstances exist, the jury is restricted by the statute to his status or situation at the time of the killing. We cannot presume that the jury will nullify its

even if it is liberally interpreted, section 1311, unlike the Texas statute approved in Jurek, does not permit the sentencing authority in making its ultimate decision to focus sufficiently upon the entire character and record of the offender.[20]

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19 Continued

instructions and disregard the law as to the circumstances it may find mitigating. Of course, if the penalty determination were to depend upon "a particular jury's willingness to act lawlessly," the arbitrariness and lack of standards in sentencing condemned in Furman would remain. Woodson v. North Carolina, supra, 428 U.S. at , 96 S.Ct. at 2991.

20 A comparable situation was presented to the Court of Appeals of Maryland when it found that state's death-penalty statute invalid:

"It is true, of course, that [the statute] permits elements of mitigation to be presented to the jury, i.e., proof of the defendant's age and of the motive for the act in the context of resolving the question of the proximate cause of the victim's death. We are unable to conclude, however, that the presentation of these two elements requires the sentencing authority to focus on the specific circumstances of the crime and the particular characteristics of the offender to the extent constitutionally required by the controlling Supreme Court decisions. That Blackwell was afforded an opportunity to present, and did present, broad circumstances of mitigation to the jury hardly suffices as the measure of the statute's constitutionality; the jury was neither required nor permitted by the statute to weigh or objectively focus on Blackwell's character and record before returning its verdict and causing the death sentence to be imposed upon him."

In addition, the Commonwealth argues that, even if section 1311 does not permit sufficient consideration of the character and record of the offender, Moody lacks standing to complain since he offered no evidence of mitigating circumstances other than that of his asserted youth and lack of maturity. The record reveals, however, that Moody's counsel prior to the penalty hearing did object to the insufficient consideration of mitigating circumstances permitted by section 1311. Furthermore, this Court has previously indicated that a person sentenced to death under a statute unconstitutional on its face has standing to complain regardless of the actual proceedings in his case. See Commonwealth v. Martin, 465 Pa. 134, 348 A.2d 391 (1975); Commonwealth v. Dobrolenski, 460 Pa. 630, 334 A.2d 268 (1975). We thus conclude that Moody does have standing to attack the constitutional deficiences of section 1311.

Finally, the Commonwealth notes that the plurality of the United States Supreme Court has expressly reserved the question of whether a prisoner already serving a life sentence may be subject to a mandatory death penalty. See Harry Roberts v. Louisiana, supra. The Commonwealth therefore contends that, since Moody was serving seven consecutive life sentences at the time of Price's killing, he may constitutionally be sentenced to death regardless of any general constitutional defects in section 1311 relating to mitigating circumstances. The question, however, of a

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20 Continued

Blackwell v. State, 278 Md. 466, , 365 A.2d 545, 549 (1976). See also Rockwell v. Superior Court, 18 Cal. 3rd 420, 134 Cal. Rptr. 650, 556 P.2d 1101 (1976). But see State v. Bell, 48 Ohio St. 2d, 358 N.E. 2d 556 (1976), cert. granted June 27, 1977; State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied June 27, 1977.

mandatory death sentence for a murderer already serving a life sentence is not properly before us, since section 1311 does not make death mandatory in such circumstances.[21]

Accordingly, for the reasons stated above, the order of the trial court is affirmed.

Mr. Justice Roberts took no part in the consideration or decision of this case.

Mr. Justice Nix filed a dissenting opinion.

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21 We note also that Moody was not serving a Pennsylvania life sentence at the time of Price's killing, and that at the time of his conviction instantly his sentences in the District of Columbia were still on appeal.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant : No. 280 January Term 1977

v. : Appeal from the Order of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, at No. 1429 February Sessions, 1975.

THEODORE MOODY, Appellee : Entered: January 28, 1977

DISSENTING OPINION

NIX, J. Filed: November 30, 1977

The majority has determined that the legislature in drafting Section 1311 of the Sentencing Code, 18 Pa. C.S.A. §1311 (Supp. 1977-78) has failed to meet the standards required under the Eighth and Fourteenth Amendments to the Federal Constitution and consequently holds that the death sentence imposed in this case under Section 1311 must be set aside.[1] My interpretation of the

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1) Although Theodore Moody, through his counsel, raised the question as to the propriety of the death sentence under Art. I, §13 of the Pennsylvania Constitution, neither the court en banc nor the majority of this Court considered that issue. I will therefore confine my discussion in this opinion to a consideration of the Federal Constitutional questions raised under the Eighth and Fourteenth Amendments. My decision not to address the problems that might be raised under Art. I, §13 at this time should not be construed as indicative of my view as to the merits of those issues.

United States Supreme Court decisions that followed Furman v. Georgia, 408 U.S. 238 (1972), leads me to conclude that the Pennsylvania scheme for the imposition of the death penalty in cases of murder of the first degree is in accord with the Federal Constitutional mandates and I therefore must disagree with the conclusion reached by the majority.

I.

In the afternoon of December 29, 1974, the body of James Price, an inmate of Holmesburg Prison, was found hanging by a bedsheet suspended from a grate inside cell 457 of "D" block of the prison by a prison guard.[2] Death was determined to have occurred between four to eight hours prior to the discovery of the body. The pathologist's examination revealed that the cause of death was strangulation. Additionally, it was ascertained that the victim had been tortured and mutilated before death.[3]

Calvin Hunter testified that he was an inmate of the prison at the time in question and that he had been transferred to "D" block on the morning of December 29, 1974, as a consequence of a disciplinary violation on "C" block where he had formerly been assigned. At approximately 9:00 A.M. on that date, Hunter stated that the area became unusually

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2) Cell block "D" is a maximum security area.

3) The instrument causing death was a ligature or garrote fashioned from three shoe laces, which was secured around the victim's neck. There were numerous recent injuries on the body; the most noticeable were in the area of the testicles and rectum. These injuries were determined to have been caused by multiple insertions of a sharp instrument that would have caused excruciating pain.

quiet. He then heard noises from the front of the block and as the noise came closer he was able to observe, appellee, Theodore Moody, Theodore Brown and John Griffin with the victim between them. 4) The group proceeded in the direction of cell 457 at which point Hunter heard the victim screaming for help and yelling "They're killing me". When the noise stopped, appellee, Theodore Brown and John Griffin retraced their steps past Hunter's cell going in the opposite direction. Hunter called out to Griffin and inquired as to the reason for the noise. In response, Griffin stated, "Nothing that concerns you."

The Commonwealth also presented evidence as to the question of motive. The victim, Price, had cooperated with Federal authorities and testified before the grand jury relating to the Hanafi Muslim murders which occurred in Washington, D. C., on January 16, 1973. The testimony of the victim implicated Theodore Moody in the Hanafi massacre. As a result, Moody was indicted, charged and convicted of 14 counts of murder. On the day in question, Moody was aware that Price had cooperated with the Federal authorities in bringing about his conviction for the Washington crimes.[5]

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4) Hunter described their respective positions as being somewhat like a football huddle with Price in between the three men.

5) The instant killing occurred on December 29, 1974. Moody had been convicted on May 17, 1974, for the Hanafi murders and was sentenced to seven consecutive life sentences. Although it is not clear from the record why Moody was being detained in Holmesburg Prison in Philadelphia rather than in some federal facility, it appears that he was convicted on eleven counts of aggravated robbery, burglary and rape in January of 1975. These crimes were committed in this jurisdiction and it is very probable that his detention at Holmesburg was in connection with the processing of these charges.

II

Under the statutory scheme providing for the imposition of the death penalty by a jury in this jurisdiction, an accused must first be found guilty of murder of the first degree. Murder of the first degree is defined as a criminal homicide committed by an intentional killing. 18 Pa. C.S.A. §2502(a) (Supp. 1977-78). An intentional killing is further defined as a killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing. 18 Pa. C.S.A. §2502 (Supp. 1977-78). Pennsylvania has continued its practice of a bifurcated procedure in which the question of sentence is not considered until the determination of guilt has been made. 18 Pa. C.S.A. §1311 (Supp. 1977-78). During the sentencing hearing the parties may introduce "such additional evidence not previously received from the trial as may be relevant and admissible upon the question of aggravating and mitigating circumstances". 18 Pa. C.S.A. §1311(c) (Supp. 1977-78). Argument by counsel is also permitted. Section 1311 further specifies nine aggravating circumstances and three mitigating circumstances.[6] The jury is to be

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6) Section 1311(d) provides:

> (d) Aggravating and mitigating circumstances.--If a murder of the first degree is accompanied by at least one of the following aggravating circumstances and none of the following mitigating circumstances, the person convicted shall be sentenced to death. If a murder of the first degree is not accompanied by any of the following aggravating circumstances or is accompanied by at least one of the following mitigating circumstances the person convicted shall be sentenced to life imprisonment:
>
> (1) Aggravating circumstances:
> (i) The victim was a fireman, peace officer or public servant concerned in official detention

(Footnote 6 continued from page 24A)

as defined in section 5121 of this title (relating to escape), who was killed in the performance of his duties.

(ii) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(iii) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(iv) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(v) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(vi) The defendant committed a killing while in the perpetration of a felony.

(vii) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(viii) The offense was committed by means of torture.

(ix) The defendant has been convicted on another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

instructed as to the various mitigating and aggravating circumstances and advised that a sentence of death may not be imposed unless they find the existence of one or more aggravating circumstances beyond a reasonable doubt and determine that none of the statutorily enumerated mitigating circumstances are present. The decision to return the sentence of death must be unanimous, thus the failure to agree upon the aggravating and mitigating circumstances will result in the imposition of a life sentence. As indicated above, the aggravating circumstances must be proved beyond a reasonable doubt but the existence of the statutory mitigating circumstances need only be shown by a preponderance of the evidence.

In addition to the conventional appellate process available in all criminal cases, which in this Commonwealth provides that there is a direct appeal in homicide cases to the Supreme Court,7)

(Footnote 6 continued from page 25A)

(2) Mitigating circumstances:

(i) The age, lack of maturity, or youth of the defendant at the time of the killing.

(ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.

(iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress).

7) The jurisdiction of this Court over the instant appeal is found in the Appellate Court Jurisdiction Act of July 31, 1970, P.L. 673, No. 223, art. II, §202(1), 17 P.S. §211.202(1) (Supp. 1976-77).

provision is made for special expedited direct review by the Supreme Court of Pennsylvania "within 60 days after certification by the sentencing court of the entire record." 18 Pa.C.S.A. §1311(g) (Supp. 1977-78). The law of this Commonwealth also provides that a death sentence may be commuted by executive clemency. Art. 4, §9 of the Pennsylvania Constitution.

III

Responding to the United States Supreme Court's decision in the case of Furman v. Georgia, supra, this Court struck down the Pennsylvania statute then in effect[8] as violative of the Eighth and Fourteenth Amendments of the Federal Constitution. Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972). See also, Commonwealth v. Dobrolenski, 460 Pa. 630, 334 A.2d 268 (1975); Commonwealth v. Scoggins, 451 Pa. 472, 304 A.2d 102 (1973); Commonwealth v. Ross, 449 Pa. 103, 296 A.2d 629 (1972); Commonwealth v. Lopinson, 449 Pa. 33, 296 A.2d 524 (1972); Commonwealth v. Sharpe, 449 Pa. 35, 296 A.2d 519 (1972). Thereafter, the legislature enacted Section 1102 which became effective June 6, 1973. 18 Pa.C.S.A. §1102. Section 1102 provided:

> "A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment."

This section was distinguished by a complete lack of direction as to the circumstances that would warrant imposition of the death penalty. Additionally, at that time the murder statute was designed to include willful and deliberate killings

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8) Act of June 24, 1939, P.L. 872, §701, as amended, 18 P.S. §4701.

as well as felony murders under the category of murder of the first degree. 1972, Dec. 6, P.L. ___, No. 334, §1, eff. June 6, 1973; 18 Pa. C.S.A. §2502(a).[9] It would appear that Section 1102 was not passed in an effort to meet the objections raised in Furman, but rather for the sole purpose of providing some legislative authority for the imposition of a death sentence until an appropriate scheme pursuant to the Furman mandate could be formulated. Present Section 1311 is the provision which the legislature designed in an effort to fulfill the Furman requirements.

IV.

The quintet of cases handed down by the United States Supreme Court on July 2, 1976[10] answered the question left open by that Court's decision in Furman. These cases make it clear that a state can design a procedure for the imposition of the death penalty for murder of the first

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(9) This section provided:

> (a) Murder of the first degree.--A criminal homicide constitutes murder of the first degree when it is committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing. A criminal homicide constitutes murder of the first degree if the actor is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.

(10) See Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976).

degree that may be found to be consistent with the mandates of the Eighth and Fourteenth Amendments to the satisfaction of a majority of the members of the United States Supreme Court as it is presently constituted. The task is complicated however by the fact that the differing views expressed in Furman have yet to congeal to an extent where there is a consensus by a clear majority of Justices as to those factors which must be present to assure compliance with the constitutional standards. Mr. Justice BRENNAN and Mr. Justice MARSHALL have maintained their view that the Federal Constitution prohibits capital punishment for all crimes under all circumstances. Mr. Chief Justice BURGER and Justices BLACKMUN and REHNQUIST, dissenters in Furman, have continued to find all of the statutory schemes considered by that Court to comport with their concept of the Eighth and Fourteenth Amendments. Mr. Justice WHITE, although concurring in the result in Furman, has since been aligned with the Chief Justice and Justices BLACKMUN and REHNQUIST. Up to this point the constitutionality of a statutory scheme for the imposition of the death sentence has been dependent upon the view of a plurality consisting of Mr. Justices STEWART, POWELL (a dissenter in Furman) and STEVENS. Thus, it is legitimate to conclude that if section 1311 provides a statutory scheme acceptable under the standards articulated by this "plurality" it would more than likely withstand a constitutional challenge in the Federal system.

Turning to an analysis of the view of the "plurality", it is apparent that although they have agreed that the punishment of death is not per se violative of the Federal Constitution, Gregg v. Georgia, 428 U.S. 153 (1976), a statutory scheme may run afoul of the constitutional mandates if it is not in accord with the "evolving standards of decency that mark the progress of a maturing society." In ascertaining these "evolving standards of decency", the "plurality" has suggested that an assessment of contemporary values and a determination of whether the penalty is in accord with "the

dignity of man" are relevant considerations.(11) The plurality has also suggested that in any assessment of a statutory scheme promulgated by the legislature, there should be a heavy burden upon those "who would attack the judgment of the representative of the people." (12) Utilizing these

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(11) "A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' Trop v. Dulles, supra, at 100 (plurality opinion). This means, at least, that the punishment not be 'excessive.' When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety for a specific crime) is under consideration, the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Furman v. Georgia, supra, at 392-393 (BURGER, C.J., dissenting). See Wilkerson v. Utah, 99 U.S., at 136; Weems v. United States, 217 U.S., at 381. Second, the punishment must not be grossly out of proportion to the severity of the crime. Trop v. Dulles, supra, at 100 (Plurality opinion) (dictum); Weems v. United States, supra, at 367."

Gregg v. Georgia, supra at 173.

(12) "Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

basic propositions the "plurality" concluded:

> "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." Gregg v. Georgia, supra at 187.

(Footnote 12 continued from page 30A)

> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' Furman v. Georgia, 408 U.S., at 383 (BURGER, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, id., at 465-470 (REHNQUIST, J., dissenting), is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.' Gore v. United States, 357 U.S. 386, 393 (1958). Cf. Robinson v. California, 370 U.S., at 664-665; Trop v. Dulles, 356 U.S., at 447. Caution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility... throughout the country.' Powell v. Texas, 392 U.S. 514, 533 (1968). A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be

In considering the procedure to be followed in reaching the decision of life or death, the "plurality" has perceived the mandates of Furman to require that the sentencing scheme must be so designed as to avoid "a substantial risk that it [the death sentence] would be inflicted in an arbitrary and capricious manner."

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."
>
> Gregg v. Georgia, supra at 189.

The "plurality" has determined that the information necessary to be supplied to a jury to permit it to properly consider such a decision must include facts relating to "the circumstances of the offense together with the character and propensities of the offender." Gregg v. Georgia, supra. The "plurality" also requires that the sentencing scheme must make some effort to provide the jury with guidance regarding these factors about the crime and the offender.

> "While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal

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(Footnote 12 continued from page 31A)

> made in the light of further experience. See Furman v. Georgia, supra, at 461-462 (POWELL, J., dissenting)."
>
> Gregg v. Georgia, supra at 175-76

Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed, and weighed against each other, when they are presented in a concrete case.' Model Penal Code §201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959) (emphasis original). While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." (Footnotes omitted).

Gregg v. Georgia, supra at 193-95.

In determining whether the procedure itself is a fair one, the "plurality" has given its imprimatur to schemes that allow the sentencing decision to be made by a jury. They do however strongly indicate that where the jury is to be entrusted with the sentencing decision, a bifurcated procedure should be employed.

> "Jury sentencing has been considered desirable in capital cases in order to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance

> to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure--one in which the question of sentence is not considered until the determination of guilt has been made--is the best answer."

Gregg v. Georgia, supra at 190-91.

The "plurality" has also looked favorably on attempts to narrow the class of murders subject to the extreme sanction and also provisions for expedited appellate review. Gregg v. Georgia, supra. Although expressing a strong preference for individualized sentences rather than mandatory ones, Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Harry Roberts v. Louisiana, 97 S. Ct. 1993 (1977); Green v. Oklahoma, 96 S. Ct. 3216 (1976); Sparks v. North Carolina, 96 S. Ct. 3213 (1976), there is a suggestion that the "plurality" might find acceptable a narrowly-defined category of offenders where mandatory sentences might not be offensive.(13)

(13) One possible exception noted by the "plurality" appears to be a mandatory death penalty statute limited to an extremely narrow category of homicide such as murder by a prisoner serving a life sentence. See Woodson v. North Carolina, 428 U.S. 280, 286, n. 7, 292, n. 25 (1976). In Woodson, the "plurality" suggested that where the accused is serving a life sentence at the time of the killing that fact alone might provide sufficient insight as to the character of the offender to meet their concept of the Eighth and Fourteenth Amendments' mandate in this regard. Id. at 286, n. 7. Also significant in this context is the following observation which appears in the "plurality's" opinion in Gregg.

> "And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate". Gregg v. Georgia, supra at 186.

Analyzing the Pennsylvania scheme in view of the considerations and factors deemed important by the plurality, we must begin with the presumption that the legislative enactment is to be accorded the presumption of constitutionality and that those challenging the statutory scheme must bear a heavy burden. Gregg v. Georgia, supra at 175. We are also obligated to follow the statutory law of this jurisdiction which requires an interpretation of legislative intent to be, wherever possible, consistent with the Constitution of the United States as well as the Constitution of this Commonwealth. 1 Pa. C.S.A. §1922(3) (Supp. 1977-78).

Turning to the first maxim that a penalty must not be "excessive", it is apparent that section 1311 satisfies this requirement. The Pennsylvania legislature has limited the imposition of capital punishment to convictions of murder in the first degree, §1311(b), which in this jurisdiction is confined to killings "committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing." 18 Pa. C.S.A. §2502(2) (1972). The "plurality" has given its approval to the application of the death penalty to broader definitions of murder, e.g., felony-murder. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, supra. In fact, under the Pennsylvania scheme, which limits the type of murder which may be punished by death to a deliberate taking of life, there is compliance with the express language of the "plurality" in Gregg.

> "...when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes." Gregg v. Georgia, supra at 187.

(Footnote 13 continued from page 34A)

The appellee in the appeal presently before us has not only been sentenced to seven consecutive life sentences, but also the crime was committed while he was confined under maximum security. It is therefore difficult to postulate a factual situation more compelling than the facts before us in this appeal where another life sentence would be more inadequate.

Thus, under the guidelines that have been articulated by the "plurality" it is clear that the Pennsylvania scheme provides a punishment which is not "grossly out of proportion to the severity of the crime." To the contrary, it fits neatly within the perimeters that have been found to be acceptable by the plurality.(14)

Regarding the Court's concern with avoiding unbridled discretion on the part of the jury, the Pennsylvania legislature has provided safeguards designed to prevent the risk of such arbitrary action. Section 1311(c) provides for a mandatory consideration by the jury of aggravating and mitigating circumstances in determining whether to impose the death penalty. The circumstances listed in the statute, §1311(d), provide the "direction" and "limitation" for the jury that Furman and Gregg required "to minimize the risk of wholly arbitrary and capricious action."

A somewhat comparable scheme of aggravating and mitigating circumstances was approved in Proffitt v. Florida, supra. It is significant that under the Pennsylvania scheme the possibility of arbitrary action is further minimized by the requirement that the imposition of death is mandatory where one or more of the statutorily enumerated aggravating circumstances is present and there is an absence of any of the mitigating factors. On the other hand, under the Pennsylvania scheme, where there is a finding of one of the mitigating circumstances or a finding that none of the aggravating circumstances are present, then the sentence must be life imprisonment. In contrast, the Florida statute permits the jury to weigh the competing factors without providing any specific weight to be given to the various factors. Thus, the Pennsylvania scheme clearly provides a more controlled exercise of the sentencing discretion.

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(14) As of the writing of this opinion, the "plurality" has yet to express a view on the acceptable manner of the imposition of the death sanction. It can only be assumed that the traditional methods of execution will not be found to be constitutionally prohibited.

Finally, the plurality has expressed certain preferences concerning the sentencing procedure itself. The Pennsylvania procedure strongly approximates the procedures upheld in Gregg, Proffitt and Jurek. The Pennsylvania statute, like the Georgia, Florida and Texas statutes, provides for a bifurcated proceeding, §1311(c); and it provides for the automatic expedited appellate review, §1311(g).(14a)

V.

The conclusion by the majority of this Court and the court en banc that section 1311 did not comport with constitutional standards is premised upon the belief that the section fails to provide for the dissemination of sufficient information relating to the character and background of the offender to the jury. In my judgment, this position can only be supported by an unwarranted, restrictive reading of the language of section 1311. Further, such a construction ignores our responsibility to interpret legislative enactments so that their terms comply with constitutional directives. 1 Pa. C.S.A. §1922(3) (Supp. 1977-78). Even more grievous is the fact that the construction urged by the majority produces a result that is at variance with the long standing sentencing policies in this jurisdiction.

The United States Supreme Court in ruling upon the death penalty statutes that have been promulgated since Furman, has properly considered the terms of those enactments in light of the construction placed upon them by the State's highest court. Gregg v. Georgia, supra at 201-202; Proffitt v. Florida, supra at 255-256; Jurek v. Texas, supra at 272. It is my judgment that the language of section 1311 properly construed by this Court would clearly meet constitutional muster.

(14a) The Pennsylvania statute also places the sentencing decision with the jury where the determination of guilt was made by the jury, a procedure which was approved in Gregg, supra.

It has been the long settled law of this jurisdiction that even in non-capital cases a consideration of the defendant's background and character is an important element in the sentencing decision. Commonwealth v. Martin, 466 Pa. 118, 351 A.2d 650 (1976).(15) Even prior to Furman, we held in capital cases that a trial court abused its discretion when it imposed the death penalty solely on the basis of the criminal act. Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1951). At that early stage our cases made it clear that it was improper to fail to consider the character of the convicted individual and to make inquiry as to the existence of any extenuating or mitigating circumstances. Commonwealth v. Green, supra. See also, Commonwealth v. Garramone, 307 Pa. 507, 515, 161 A.733, 737 (1932); Commonwealth v. Irelan, 341 Pa. 43, 47, 17 A.2d 897, 898-99 (1941). In Commonwealth v. Green, supra, this Court stated:

> "The imposition of the death penalty by a judicial tribunal should be made only when it is the sole penalty justified both by the criminal act and the criminal himself and then only after a full and exhaustive inquiry into both the criminal act and the criminal himself. Time and again in referring to the duty of juries in fixing the penalty between death and life imprisonment we have insisted that the jury exercise its discretion only after it has considered all the evidence, culpatory and exculpatory, incriminating and extenuating, including what manner of man the criminal is and has been: Com. v. Wooding, 355 Pa. 555,

(15) Although this writer dissenting in Commonwealth v. Martin, 466 Pa. 118, 136, 351 A.2d 650, 659 (1976), my disagreement was not related to the law as it was expressed by the majority in that opinion, but rather its application to the facts then before the Court.

557, 50 A.2d 328; Com. v. Stabinsky, 313 Pa. 231, 237, 238, 169 A. 439; Com. v. Dague, 302 Pa. 13, 15, 152 A. 839; Com. v. Bentley, 287 Pa. 539, 135 A. 310. The same rule binds a court sitting without a jury to determine the penalty for murder of the first degree."

Id. at 148, 151 A.2d at 259.

In addition to the Pennsylvania case law, the legislature of this State since early in the twentieth century has embraced the concept of indeterminate and individualized sentencing. First, this State required sentencing of minimum to maximum terms of imprisonment. Act of June 19, 1911, P.L. 1055, §6, as amended, 19 P.S. §1057 (1964). Then the legislature reinforced this provision by allowing suspension of sentence and probation, at the court's discretion, in all but the most serious crimes. Act of June 9, 1911, P.L. 1055, §1, as amended, 19 P.S. §1051 (1964). Following that, the sentencing court was conferred with the power to run sentences consecutively or concurrently. Act of May 28, 1937, P.L. 1036, §1. Finally, the legislature gave the trial court the power to order a pre-sentence report and a psychiatric and diagnostic examination of the defendant to determine the appropriate disposition. Act of March 31, 1860, P.L. 427, §73.1. Most recently, the legislature codified their philosophy of individual sentencing in requiring courts to "call for the minimum amount of confinement that is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." 18 Pa. C.S.A. §1321(b) (Supp. 1977-78). See generally Commonwealth v. Martin, supra.

To ignore this abundant evidence of a firmly established principle of sentencing in our construction of the instant section is totally unsupportable. This is particularly true in light of the fact that section 1311 is a part of the

sentencing code which has expressly reaffirmed its adherence to the philosophy of individualized sentencing. 18 Pa. C.S.A. §1321(b) (Supp. 1977-78). To justify an interpretation of section 1311 which would reject individualized sentencing would require clear and unambiguous language in the enactment under scrutiny evidencing such an intention. Such is clearly not the case here.

The majority opinion and court en banc focuses upon section 1311(d)(2)(i), regarding the age, lack of maturity and youth of the defendant, in finding the statute unconstitutional. By improperly focusing upon the clause "at the time of the killing" the majority argues that the section excludes a sufficient consideration of the total character of the accused. The spirit of the Pennsylvania case and statutory law require a different result as the term "lack of maturity" is easily susceptible to a broad interpretation so as to encompass considerations of the defendant's character and background. The term "maturity" is defined by Webster's Third New International Dictionary, as having attained the normal peak of natural growth and development.(16) In order to determine what stage of development an individual has reached, there would necessarily have to be an examination of all of the factors influencing the developmental process. Relevant to this analysis is the individual's home life including whether he emerges from affluent or deprived circumstances, the number of parents he was raised by and the quality of the rearing, the environment of the neighborhood in which he was raised, his emotional and psychological makeup, his education exposure, whether or not he has had any military experience, his past criminal offenses, if any, including both adult and juvenile convictions, his religious training or lack of it, and any medical or cosmetic infirmities that might reflect on his maturity. Therefore, all of the constitutionally required considerations are implicit in the definition of "lack of maturity."

(16) "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa. C.S.A. §1903(a) (Supp. 1977-78).

Additionally, "age" "youth" and "maturity" cannot all be construed to have the same meaning. "Lack of maturity" must have some relevance beyond chronological age for it is a well-established rule of statutory construction in this jurisdiction that the General Assembly intends all of the statutory provisions to be effective and certain, 1 Pa. C.S.A. §1922(2) (Supp. 1977-78) and the legislature cannot be deemed to intend any language of a statute to be superfluous and without import. Consumers Education and Protective Association v. Nolan, ___ Pa. ___, 368 A.2d 675 (1977).

The "plurality" of the United States Supreme Court in Jurek v. Texas, supra, was willing to find the Texas death penalty statute to be broad enough to encompass the defendant's character. The death penalty statute in Texas, Tex. Code Crim. Proc., Art. 37.071 (Supp. 1975-76), requires the jury to answer three questions subsequent to a verdict of guilty of one of their enumerated capital homicides.(17) A positive answer to all three questions will result in the imposition of the death penalty. The constitutionality of this procedure turned on whether the questions allow consideration of particularized mitigating factors. The Court found that question two, concerning the probability of the defendant committing further acts of violence, allows a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show,

(17) "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violance that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Art. 37.071(b) (Supp. 1975-76).

because the Texas Court of Criminal Appeals indicated that it would interpret question two to that effect. Likewise, if the Pennsylvania Supreme Court would interpret "lack of maturity," as it should, to encompass the consideration of the defendant's character and background, section 1311 would also be constitutionally sound.

Even accepting the narrow interpretation of the majority opinion and the court en banc, the United States Supreme Court has struck down only the mandatory death penalty statutes lacking any consideration of mitigating factors. Woodson v. North Carolina, supra; Roberts v. Louisiana, supra; Harry Roberts v. Louisiana, supra. This suggests that perhaps only a complete foreclosure of the introduction of any mitigating circumstances would render a death penalty statute unconstitutional. This possibility is further supported by the suggestion of the "plurality" that a mandatory death penalty statute which is limited to the narrow category of murder by a prisoner serving a life sentence may be valid. See Woodson v. North Carolina, supra at 286, n. 7, 292, n. 25.

VI.

In conclusion it is my view that the Pennsylvania statutory scheme for the imposition of the death sanction in murder cases when fairly read is fully in accord with the announced philosophy of the "plurality" of the Supreme Court. To reach a contrary conclusion the majority has strained and tortured the unambiguous language of section 1311. It is particularly regrettable that my brethren chose to express their apparent misguided sympathy for the instant appellee. Even under the furthest stretch of the imagination a credible theory cannot be propounded to support the view that the imposition of the death penalty for this offender would be repulsive to "the evolving standard of decency." I feel that the majority's attempt to find a basis for giving relief on a facial attack upon the section is equally as untenable.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : FEBRUARY TERM, 1975

VS. :

THEODORE MOODY : NOS. 1429 - 1430

OPINION OF COURT EN BANC
STOUT, SAVITT, PRATTIS, JJ.
(SAVITT, J. CONCURRING)

PRATTIS, J. October 19, 1976

I. STATEMENT OF FACTS

Sometime shortly after 3:00 p.m. on December 29, 1974, the body of James Price was found hanging by a bedsheet suspended from a grate inside cell 457 of "D" block, Holmesburg Prison, in Philadelphia, Pennsylvania. Price's body was discovered by a prison guard, Philip Harris. After locating his partner, Harris returned to cell 457 and cut the body of Price down. Immediately thereafter, Harris ordered all the residents of "D" block to their cells. His attention was called by one Calvin Hunter, an inmate of cell 453 on "D" block. Hunter stated to Harris that "they killed a guy back there". Shortly thereafter, at the warden's instructions, Harris removed Hunter from "D" block. Harris knew the deceased, James Price, and his cellmate, defendant Theodore Moody.

Dr. Robert Seto was assigned to the medical diagnostic unit at Holmesburg Prison on December 29, 1974. On that day he was summoned to "D" block between 3 and 4 P.M., and after examining James Price, pronounced him dead. Dr. Seto was of the opinion that at the time of his examination the condition of rigor mortis was present and, because of that, estimated that James Price had died from between 4 to 8 hours prior to 3:30 P.M.

On December 30, 1974, a post mortem examination of the body of James Price was performed by Dr. Halbert Fillinger, an assistant medical examiner for the City of Philadelphia. Dr. Fillinger found that there were 3 black shoelaces around Price's neck which were tied with a square knot. Also around Price's neck was a loop of braided white cloth. In Dr. Fillinger's opinion the cause of death was strangulation and that it was the shoelaces and not the white cloth which caused the strangulation. Dr. Fillinger also found numerous other injuries on the body of James Price, including discolorations of the lining of both lips and of the lining of the mouth; skin scrapings on the chin and the thigh; discoloration of the lining of the bowels at the anus; pinpoint hemmorrhaging of the eyelids and a tear in the opening of the rectum extending from the back of the scrotum to the anus. Dr. Fillinger's findings on the interior of the body of the deceased showed extensive hemorrhaging in both testicles and, in his opinion, the injury to the para-rectal area was inflicted with a sharp-edged instrument with a pointed end. In Dr. Fillinger's opinion there were multiple insertions and these injuries were inflicted before death. In Dr. Fillinger's opinion, the manner of death of James Price was homicide.

At 8:00 A.M. on the morning of December 29, 1974, Calvin Hunter was transferred from "C" block in Holmesburg Prison to "D" block and placed in cell 453. At approximately 9:00 A.M. Hunter was lying on his bed reading a book when he heard some noise which he described as the sound of exercises being conducted in harmony. Shortly thereafter, the noise stopped and Hunter heard the sound of persons walking down the cell block. Looking out of the cell door, he saw John Griffin, Theodore Brown, Theodore Moody and James Price. Hunter described their formation as being somewhat like a football huddle with Price in between the three others. Hunter observed these men go past his cell towards the direction of cell 457 and he resumed reading his book.

Shortly thereafter, he heard a man yelling for help, saying "Help, they're killing me, please help me, somebody please help me, they're killing me". Hunter also heard noises as scuffling on the floor. All of these noises were coming from the rear of the block towards the direction of cell 457. The cell block became quiet again and Hunter shortly saw John Griffin, Theodore Moody and Theodore Brown come walking past his cell again away from the direction of cell 457. He called out, "Hey Griff. . . what was all the noise?" As if they were snapping to attention, the three men turned to face him and John Griffin stated "Nothing that concerns you."

Sometime that afternoon after 3:00 P.M. Calvin Hunter was taken from his cell to the Deputy Warden's office. He was shown photographs of all of the inmates in the "D" block of Holmesburg Prison as of that date, and he identified the photographs of Theodore Brown, John Griffin, and the defendant, Theodore Moody, as the three men that he saw with James Price that morning.

On February 13, 1975, Calvin Hunter testified to the above facts at a preliminary hearing in Room 453 City Hall, Philadelphia, Pennsylvania, before the Honorable David Savitt. During that hearing, counsel for defendant Moody, as well as counsel for John Griffin and Theodore Brown, availed themselves of the opportunity of cross-examining Hunter at great length. Between February 13, 1975 and the date of the trial of this case, Calvin Hunter died. Detective Jack Gillespie, of the Philadelphia Police Department, after learning of the death of Calvin Hunter, went to the Edward Baker Funeral Home, where he saw and identified the body of Calvin Hunter.

Hunter's testimony at the preliminary hearing was read at trial by Stanley Goldstein, court stenographer at the preliminary hearing on February 13, 1975. Hunter's prior recorded testimony was admitted into evidence in accordance with the requirements of 19 P.C.S.A. §852.

James Greaves was a resident in "D" block, cell #461 on December 29, 1974. On that date he heard shouting and screaming to the effect "God help me, I think they're killing me." At the time of the screaming, Greaves was aware that the other inmates of the cell block were out in the yard exercising and he could hear the cadence of the exercising being counted. Greaves also heard noises like a bed scrapping against the floor.

The body of James Price was identified at the office of the Philadelphia Medical Examiner by his wife, Josephine Price. Mrs. Price described her husband as a short and stocky man who was a member of the Muslim faith.

On January 16, 1973, an incident occurred in Washington, D.C. which is here referred to as the Hanafi Muslim murders. On January 18, 1973, John Evans, Esquire, an Assistant U. S. Attorney for the District of Columbia, was assigned to the investigation and prosecution of these murders. Price, Griffin and Moody were suspects in the Hanafi Muslim murders, and prior to the time that any arrests were made, Evans spoke with James Price. As a result of these conversations, Price agreed to cooperate with the government and in fact gave a statement indicating his part in the Hanafi murders. That statement implicated Theodore Moody and others. While all of the defendants were originally scheduled to be tried jointly for the Hanafi murders in the District of Columbia, the government's case against Price was severed from the other defendants (including Moody) on the ground that Price was intended to be used as a government witness. Copies of the motion to sever indicating the grounds for severance were served on defense counsel for Moody, and Moody was present in court in the District of Columbia when the motion was orally presented. In addition, Price's statement was handed to all defense counsel in open court in the District of Columbia, including District of Columbia counsel for Theodore Moody.

Defendant offered the testimony of three Holmesburg correction officers who worked the 7A.M. to 3 P.M. shift on December 29, 1974 on "D" block. Generally, they testified that during that time they heard or saw nothing unusual, that most of the inmates were in the exercise yard during that morning, and that they knew Moody and Price to be good friends.

Four persons who were inmates in Holmesburg Prison, "D" block on December 29, 1974, testified that they were in the exercise yard that morning and that they observed the defendant Moody in the yard during all of the morning hours doing exercises and playing various games.

The defendant also offered the testimony of James Turner, a prisoner in the Detention Center in Philadelphia, Pennsylvania, who testified that he spoke with Calvin Hunter on an occasion when Hunter bragged that he had received substantial concessions from the Philadelphia District Attorney in return for his testimony against Moody, Brown and Griffin.

The defendant himself testified that on December 29, 1974, he was in the exercise yard during the morning hours and did not see Price in the yard. He stated that he did not return to his cell until lunchtime. The defendant testified that Price never mentioned the Washington statement to him. Further, Moody asserted that while he was aware that Price had been listed as a government witness in the Hanafi Muslim murder case in the District of Columbia, Price did not testify in that case, and that there was no change in their friendly relationship due to Price's being listed as a witness. The defendant denied any involvement in the death of James Price.

After completion of the presentation of evidence, both counsel presented closing arguments and the court charged the jury. After deliberation, the jury found defendant guilty of murder in the first degree.

The court then convened a penalty hearing in accordance with the Act of 1974, March 26, No. 46, 18 Pa. C.S.A. §1311. Assistant United States Attorney John Evans was recalled to the witness stand by the Commonwealth, whereupon he testified that defendant Moody was found guilty in the District of Columbia trial of the Hanafi Muslim murders, of 7 counts of premeditated murder and 7 counts of first degree felony murder. On each of the aforementioned counts Moody was sentenced to 20 years imprisonment to life imprisonment. Seven of the sentences were made to run concurrently with the remaining 7 sentences which were to run consecutively. At the time of the instant trial, these convictions were on appeal in the District of Columbia.

In the penalty hearing, defendant's mother testified that he had completed the 10th grade at Benjamin Franklin High School in Philadelphia, and that in her opinion he was not quite nature and easily led.

The court then charged the jury as to the meaning of aggravating and mitigating circumstances under the Act. The jury was advised that if they found the existence of an aggravating circumstance (among the 2 aggravating circumstances which the Commonwealth argued existed in this case) and no mitigating circumstances, then the defendant would be sentenced to death. The court further advised the jury that in the event that a mitigating circumstance was found the defendant would receive a sentence of life imprisonment. In addition, the court instructed the jury that the burden of proof of mitigating circumstances was by a preponderance of the evidence, and that in order to find an aggravating circumstance, they would have to find its existence beyond a reasonable doubt. After further deliberation, the jury returned stating they had found the existence of aggravating circumstances and no mitigating circumstances.

II. DISCUSSION OF THE LAW

A. FURMAN V. GEORGIA, 408 U.S. 238 (1972)

In Furman, a per curiam opinion held that the imposition and carrying out of the death penalty in the cases before it constituted cruel and unusual punishment in violation of the 8th and 14th Amendments. The per curiam order was accompanied by five concurring opinions and four dissenting opinions. Of the five concurring justices, Justices Brennan and Marshall held that the penalty per se was cruel and unusual punishment.

Justice Douglas' main concern was that a criminal statute, in order to satisfy the cruel and unusual punishment clause of the 8th Amendment must be evenhanded, nonselective, and nonarbitrary so that it will not be applied sparsely, selectively and spottily to unpopular groups. 408 U.S. at 257. As can be seen, Justice Douglas was concerned that the death penalty had been imposed in the past against minority groups and this, he felt, was a result of the unfettered discretion in juries to impose or not to impose the death penalty in a given case.

Justice Stewart was of the opinion that the death sentences before him were "cruel" in the sense that they are more excessive than necessary to uphold any legitimate rationale regarding punishment, and that the sentences were "unusual" inasmuch as the penalty of death is so infrequently imposed. However, Justice Stewart specifically did not rest his conclusion upon those propositions but was of the opinion that those who are sentenced to death are among a "capriciously selected random handful upon whom the sentence of death has in fact been imposed. . ." He further concluded that the 8th and 14th Amendments could not tolerate the infliction of a sentence of death in a legal system that permits this "unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 310.

Justice Stewart indicated that he was not dealing with statutes where "the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct."

Justice White was more concerned with the fact that the imposition of the death penalty under the discretionary statutes reviewed in Furman were so infrequently imposed that the social interest served by the death penalty (the deterrence theory) was no longer being served. Justice White was of the opinion that since juries have unfettered discretion in the cases before him to sentence or not to sentence to death, and since death sentence was so infrequently imposed, there was indication that the community, in its judgment, did not favor the death penalty. Given those facts, Justice White felt that there would be no meaningful basis for distinguishing the few cases in which the death penalty was imposed from the many cases in which it was not. 408 U.S. at 313.

Reading the three key opinions in Furman, it does not seem that the concurring justices reached a conclusion that any discretion whatsoever in a death penalty statute would make it violate the 8th and 14th Amendments. Rather, it appears that these justices would look at a particular statute and ask: Is the potential for arbitrariness under this statute so great that a jury or other sentencing authority, in effect, has the discretion to reach dissimilar results in similar cases. If the potential for arbitrariness is that great, the Court would conclude that the death penalty would be so infrequently imposed that its application would be "wanton", "freakish", and indistinguisable from the majority of cases in which it is not being imposed.

B. GREGG V. GEORGIA, PROFITT V. FLORIDA, JUREK V. TEXAS

GREGG V. GEORGIA

Subsequent to the trial and post-trial arguments in the instant case, the U. S. Supreme Court in Gregg v. Georgia, U. S. 44 L. W. 5230 (1976); Profitt v. Florida, U. S. 44 L. W. 5256 (1976); Jurek v. Texas, U. S. 44 L. W. 5262 (1976), upheld the Georgia, Florida and Texas capital sentencing procedures, respectively, against challenges that the procedures violated the 8th and 14th Amendments.

Justices Stewart, Powell and Stevens, in Gregg, concluded, inter alia, that:

> "The concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of information relevant to the imposition of sentence and provided with standards to guide its use of that information . . ."

> "The Georgia statutory system under which the petitioner was sentenced to death is constitutional. The new procedures on their face satisfy the concerns of Furman since before the death penalty can

> be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate . . ."

Justices White and Rehnquist and the Chief Justice concluded that:

> "Georgia's new statutory scheme enacted to overcome the constitutional deficiencies found in Furman v. Georgia, 408 U. S. 238, to exist under the old system, not only guides the jury in its exercise of discretion as to whether or not it will impose the death penalty for first degree murder, but also gives the Georgia Supreme Court the power and imposes the obligation to decide whether in fact the death penalty was

> being administered for any given class of crime in a discriminatory, standardless, or rare fashion. If the court properly performs the task assigned to it under the Georgia statute, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category or crime will be set aside."

Justices Brennan and Marshall filed dissenting opinions in all three cases, consistent with their opinions in Furman, that the death penalty per se was cruel and unusual punishment.

Under the Georgia statutory scheme there is a bifurcated procedure. During the first stage, guilt or innocence is determined. At the second stage the punishment hearing is held, during which time the judge or jury hears additional mitigating and aggravating evidence. At least one aggravating circumstance must be found to exist, beyond a reasonable doubt, before the death penalty may be imposed. There are ten aggravating circumstances listed in the statute. The scope of the mitigating circumstances is not delineated in the statute. If the death sentence is imposed, the judge or jury must specify the aggravating circumstances found.

The Georgia statute is similar to the Pennsylvania statute insofar as they both require a bifurcated procedure and the consideration of aggravating circumstances before the death penalty may be imposed. Georgia also has direct appellate review to the Georgia Supreme Court. Such appellate review was considered by the U. S. Supreme Court in Gregg as an effective safeguard against arbitrary and capricious applications of the death penalty.

Under the Pennsylvania statute, a sentence of death is subject to automatic review by the Pennsylvania Supreme Court. However, in Pennsylvania there are no statutory guidelines for the

review by the Supreme Court as have been enacted by Georgia to direct the review by the Georgia Supreme Court. This aspect of the Pennsylvania statute will be discussed in greater detail in connection with Profitt v. Florida, infra.

The Georgia Supreme Court, in determining the appropriateness of imposing the sentence of death in a particular case, must consider:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (2) Whether in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of statutory aggravating circumstances as enumerated; and
>
> (3) Whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendants."

If the Georgia Supreme Court affirms the penalty of death, it must include in its decision reference to similar cases that it has taken into consideration.

Under the Georgia statute the jury is not required to find any mitigating circumstances in order to recommend mercy, but it must find an aggravating circumstance before recommending a sentence of death. Under the Pennsylvania statute if a murder of the first degree is accompanied by at least one aggravating circumstance and none of the mitigating circumstances, the person convicted must be sentenced to death. If accompanied by at least one mitigating circumstance, the person convicted can be sentenced only to life imprisonment.

The petitioner in Gregg challenged the Georgia statute on the grounds of vagueness and overbreadth. The Court, in response, concluded

that although the wording of the statute might be subject to overbroad interpretations or considered vague, the State Supreme Court had not so interpreted the Statute, nor was there any reason to assume the Georgia Supreme Court would so interpret them, and in certain circumstances the Georgia Supreme Court had provided restrictive guidelines for the jurors. 44 L. W. at 5244. The U. S. Supreme Court also concluded, in response to petitioner's attack on the power of the jury to decline to impose the penalty even if it finds one or more of the statutory aggravating circumstances, that although the procedure provides an opportunity for caprice, it is the role of the Georgia Supreme Court to review and prevent caprice. 44 L. W. at 5244.

PROFITT V. FLORIDA

The Florida capital-sentencing procedure, upheld by the U. S. Supreme Court in Profitt v. Florida, resembles the Georgia system in that it is a bifurcated procedure, and during the punishment hearing both aggravating and mitigating circumstances are considered before the death penalty may be imposed. Thereafter, direct appeal lies to the State Supreme Court. The vital difference between the Florida and Georgia procedures is that in Florida, the judge and not the jury is the sentencing authority, the jury acts in an advisory capacity only with respect to the sentencing phase of the trial.(1)

The Florida statute differs from the Pennsylvania procedure in several respects. Under the Florida statute, the decision of whether to impose the death penalty turns upon whether certain statutory aggravating circumstances outweigh any statutory mitigating circumstances.(2) In

(1) Fla. Stat. Ann. §921.141 (a)(b)-(c) (Supp. 1976-77).

(2) Fla. Stat. Ann. §921.121 (3) (Supp. 1976-77).

Pennsylvania, if there are any mitigating circumstances, even if aggravating circumstances exist, the death penalty cannot be imposed. In Pennsylvania, there is no balancing process. As mentioned above, under Florida law the judge is the sentencing authority and the jury is merely advisory.

One similarity of the Florida statute with that of Pennsylvania, is that neither procedure requires the State Supreme Court to conduct any specific form of review. In Gregg v. Georgia, the state procedure mandated specific guidelines for review by the Georgia Supreme Court. In Profitt, the Court held that the absence of any specific form of review was not fatal to the statute. The U. S. Supreme Court held that just because no standard of review was defined in the statute, it does not follow that the review process is ineffective or arbitrary. The Court found that the Florida Supreme Court had, in fact, adopted the type of comparability review mandated by the Georgia statute. 44 L. W. at 5261. In Pennsylvania, there are no specific guidelines for review and the Supreme Court has not yet adopted the type of comparability review mandated by the Georgia statute. The U. S. Supreme Court also found that the Florida Supreme Court had vacated over 1/3 of the death sentences that have come before it. This fact rebutted the petitioner's contention that the Florida Supreme Court engaged in only cursory or rubber stamp review of the death penalty cases, and that the review was unnecessarily subjective and unpredictable. 44 L. W. at 5261.

JUREK V. TEXAS

The Texas statute, Jurek v. Texas, like the Georgia, Florida and Pennsylvania statutes, calls for a bifurcated procedure where the guilt of the defendant and the sentences are determined

in separate proceedings. The Texas statute does not contain either aggravating or mitigating circumstances which must be considered before the death penalty may be imposed. The U. S. Supreme Court concluded that while Texas has not adopted a list of statutory aggravating circumstances, the existence of which can justify the imposition of the death penalty, its action in narrowing the categories of murder for which a death sentence may be imposed served much the same purpose. 44 L. W. at 5264. In fact, each of the five classes of murder made capital by the Texas court is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances.

The Supreme Court further expressed the need for relevant evidence to be considered by the jury as to why the death penalty should not be imposed, i.e., mitigating circumstances, to satisfy the dictates of Furman. The Court found that although the Texas statute does not explicitly mention mitigating circumstances, the Texas procedure requires the jury to answer three (3) questions before the death penalty may be imposed. These three questions involve the consideration of evidence of mitigating circumstances. This was held sufficient to satisfy Furman v. Georgia's command for individualized determination. 44 L.W. at 5265.

C. ACT 46, MARCH 26, 1974, 18 P.C.S.A. 1311

Section (a) of Act 46 provides:

"(a) Findings by Jury. - The jury before whom any person shall be tried for murder shall if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first degree, murder of the second degree, or murder of the third degree." * * *

"(d) Aggravating and Mitigating Circumstances. - If a murder of the first degree is accompanied by at least one of the following aggravating circumstances, and none of the following mitigating circumstances, the person convicted shall be sentenced to death. If a murder of the first degree is not accompanied by one of the following aggravating circumstances, or is accompanied by at least one of the following mitigating circumstances, the person convicted shall be sentenced to life imprisonment ..."(3)

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(3) Aggravating circumstances:

(i) The victim was a fireman, peace officer or public servant concerned in official detention as defined in section 5121 of this title (relating to escape) who was killed in the performance of his duties.

(ii) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(iii) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(iv) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(v) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offense.

"(e) Guilty Pleas and Non-Jury Trials. - In cases of pleas of guilty or trial by court, the court shall impose sentence in accordance with rules of criminal procedure, as promulgated by the Supreme Court of Pennsylvania."

Act 46 was undoubtedly drafted with the strictures of Furman v. Georgia in mind. On its face it greatly limits the discretion of the jury. The legislative plan apparently envisioned that a person found guilty of first degree murder would have the statutory sentence imposed in an almost mechanical fashion, after the finding of facts with regard to the existence of aggravating and/or mitigating circumstances.

(Footnote #3 cont'd)

(vi) The defendant committed a killing while in the perpetration of a felony.

(vii) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(viii) The offense was committed by means of torture.

(ix) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

Mitigating circumstances:

(i) The age, lack of maturity, or youth of the defendant at the time of the killing.

(ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.

(iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress).

Viewed in its entirety, however, Act 46 is deceptively simple and, when put into operation, generates problems of constitutional dimensions.

In Bell v. U.S., 349 U.S. 81 (1955) Mr. Justice Frankfurter, speaking for the Court, construing an Act of Congress that the Court concluded was latently ambiguous, found:

"When Congress has the will it has no difficulty expressing it. . . When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration or want of sympathy with the purpose of Congress in proscribing evil and/or anti-social conduct. It may be fairly said to be a pre-supposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that the language used in criminal statutes should not be read with the saving grace of common sense with which other enactments not cast in technical language are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against. . ."

This basic principle has been also applied by the Supreme Court of Pennsylvania in its evolving concepts of statutory construction. In Commonwealth v. Hosendorf, 437 Pa. 219, 263 A.2d 439 (1970), Mr. Justice O'Brien faced with an ambiguity in a sentence by a lower court, vacated the harsher interpretation of that sentence relying upon Bell v. U.S., and, a "pre-supposition of our law to resolve doubts in the enforcement of the

penal code against the imposition of a harsher punishment." The authority of Hosendorf was minimized by the Court in Commonwealth v. Silverman, 442 Pa. 211, 218 (1971) because it did not express the views of a majority of the Court. However, the principles espoused by Mr. Justice Eagen in Hosendorf are wholly consistent with long standing basic rules of statutory construction repeatedly followed by the appellate courts of Pennsylvania.

Thus, in Commonwealth v. Glover, 397 Pa. 543 (1959), the Pennsylvania Supreme Court, in construing an act of the Legislature which imposed a mandatory five year and $5,000 sentence, held:

> "However, our interpretive approach must of course be based on the premise that this is a penal statute and as such must be strictly construed. . . In Commonwealth v. Exler, 243 Pa. 155, 162, 89 A.968, we said: 'When a criminal statute calls for construction, it is not the construction that is supported by the greater reason that is to prevail, but that one which, if reasonable, operates in favor of life and liberty' . . ."

The Court in Glover went on to review the statute. It compared it with another mandatory minimum type statute, which had previously passed muster, and pointed out that language present in the approved statute was not present in the statute under consideration. The absence of those words caused the ambiguity. The ambiguity resulted in the rule of construction quoted supra.

Considering these principles of statutory construction, it is appropriate to look at the provision of Act 46, 18 P.S. 1311(d)(2)(i) where the statute delineated the mitigating circumstances, the presence of any one of which is relevant to imposition of the death penalty in this case.

> "The age, lack of maturity or youth of the defendant at the time of the killing."

Age in that provision apparently refers to advanced age, since it is used in apposition to lack of maturity or youth. The act does not give any age guidelines. Is a 75 year old first degree murderer immune from capital punishment? Is the jury to guess at what age this provision applies?

The youth of a defendant is a mitigating circumstance. The act gives neither definitions, guidelines, nor standards for the jury. Juveniles between 14 and 18 may, in Pennsylvania, be certified for trial as an adult. Is this what the statute refers to? In Pennsylvania a defendant between 18 and 25 may be a "youthful offender". (4) The present defendant was 21 years of age when the death sentence was imposed and when the crime was committed.

Finally, "lack of maturity" is a phrase so totally subjective in its ultimate meanings as to be almost incomprehensible in the context of this statute. Does the Legislature mean a 19 year old with a mental and emotional age of 14? Does the Legislature mean a 40 year old with a mental and emotional age of 20, or the hundreds of thousands of otherwise responsible adults to whom we give the label "immature". There are no definitions, standards or guidelines included in the statute.

It is abundantly clear that different juries faced with crimes in all respects similar could quite conscientiously come to different results applying the "mitigating circumstances" that the Legislature sets forth in 1311(d)(1). This was

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(4) Camp Hill Act, 61 P.S. 483 §4; Com. ex rel. Johnston v. Pa. Board of Probation & Parole, 339 A.2d 835 (1975).

precisely the evil that Furman v. Georgia sought to abolish.

The present case is a demonstration of the arbitrary results that juries reach when required to exercise discretion pursuant to an impermissibly vague statute. The co-defendants in the present case, Griffin and Brown, aged 24 and 23 respectively, were tried immediately after the present defendant on essentially the same testimony. Both received life sentences. In the Griffin case, as in the present case, the Commonwealth asked for the Death penalty. The same aggravating circumstances were charged and proven. (Torture and prior conviction of first degree murder). The defense in the Griffin case, as in the present case, put the defendant's mother on to testify to age and lack of maturity. The jury fixed the penalty at life. Thus, an older co-defendant in the same criminal incident escaped the death penalty while the younger received it. This is exactly the freakishly arbitrary jury action that Furman, Gregg, Profitt and Jurek all seek to abolish.

In the opinion of this Court, the statutory wording of the mitigating circumstances of §1311 (d)(2)(i), in and of itself, leaves so much discretion for arbitrary decision by a jury that Furman is violated. The three enumerated factors are totally vague. They cover not only the person being too young to be sentenced to death, but a person too old to be sentenced to death, and a person who should be mature, given his age, but who has not developed as he should. No standards are given for any of these determinations.(5)

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(5) Moreover, in a case where felony murder is arguably present, the statute is again wholly inadequate under Furman. The jury, on the exact same set of facts, being instructed as to the three legislative degrees of murder could:

(1) find a defendant guilty of murder in the second degree thus limiting his sentence to life imprisonment; or

(2) guilty of first degree murder and find an aggravating circumstance mandating the death penalty.

At first blush the opinions of the U. S. Supreme Court in Jurek, and Profitt would appear to make this constitutionally insignificant. In those cases the mitigating circumstances were spelled out or inferred with even less specificity than in Act 46. But the U. S. Supreme Court held that the very broadness of those mitigating considerations saved them from constitutional proscription. A defendant could not be held to complain if a jury arbitrarily saved him from capital punishment.(6) In Act 46, however, the Pennsylvania Legislature has severely restricted the mitigating circumstances that a jury may legally consider - enumeratio unius est exclusio alterious, and has confined the jury to a consideration of the three factors set forth supra. While it is clearly constitutional to do this, it must be done with the provision of "standards to guide its use of that information." Gregg v. Georgia, supra.

Act 46 gives absolutely no standards whatsoever for a judge or a jury to rely upon in distinguishing the situations discussed above. The jury has unfettered discretion and hence more scope for arbitrary results than the justices in Furman would allow.

In this context the decision of the Supreme Court of Pennsylvania in Commonwealth v. Mack, 359 A.2d 770 (July 6, 1976) is most enlightening. There it was argued that a Pennsylvania criminal statute was unconstitutionally vague as violative of the test set forth in Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972):

> "Whether a criminal enactment 'give[s] a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' and 'encourages arbitrary and erratic arrests and convictions' . . ."

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(6) The Court did not comment on his complaint of arbitrary freedom for a co-defendant, but not for him.

The Pennsylvania Court pointed out, however:

> "The vagueness doctrine, however, is more complex than mere statement of the Papachristou test would indicate. A statute may be 'vague' in the sense that it contains no ascertainable standard of conduct, or it may be 'vague' in the sense that the ascertainable standard of conduct may or may not include certain types of conduct. Smith v. Gougen, 415 U.S. 566, 577-78, 94 S.Ct. 1242, 1249, 39 L.Ed. 2d 605 (1974). If the statute contains no standard of conduct, or if the standard of conduct prohibits conduct which is protected by the first amendment, the statute will be declared unconstitutionally 'vague' without regard to the particular conduct of the individual challenging the statute (hereinafter known as 'facial vagueness'). United States v. Powell, 423 U.S. 87, 92, 96 S.Ct. 316, 319, 46 L.Ed. 2d 228 (1975); United States v. Mazurie, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975); Smith v. Gougen, 415 U.S. 566, 577-78 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974); Commonwealth v. Heinbaugh, ___ Pa. ___, ___, 354 A.2d 244, 246-47 (1976). If, however, the statute contains an ascertainable standard which does not infringe upon protected first amendment rights, the 'vagueness' issue may be finally determined only with reference to the conduct of the person challenging the statute."

The Supreme Court of the United States has consistently held:

> "A Statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential due process of law." Connelly v. General Construction Co., 269 U.S. 389, 391 (1926).

More recently, in Grayned v. City of Rockford, 408 U.S. 104 (1972), the defendant was convicted of violating a City Anti-Noise Ordinance which imposed criminal liability on a person who, while on the grounds adjacent to a school building, "pickets or demonstrates" and causes a disruption. On appeal to the U.S. Supreme Court, the quoted language was held not vague. In its opinion, the Court stated the values which were offended by vague laws:

> "Since we assume man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.
>
> . . .
>
> "Without standards in our statutes, it is possible that there will be arbitrary and discriminatory enforcement of laws by policemen, prosecutors, judges and juries." (Emphasis added)

In Smith v. Gougen, 415 U.S. 566 (1974), the Court struck down a provision of the Massachusetts flag misuse Statute which imposed criminal liability on anyone who "treats contemptuously" the flag of the United States. In that case, the defendant wore a small cloth version of the United States flag on the seat of his trousers. The Court stated that the Void for Vagueness Doctrine "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'." 415 U.S. at 573-74. The Court in Cougen also stated that "due process requires that all 'be informed as to what the State commands or forbids.'" 415 U.S. at 574, citing Lanzetta, supra, 306 U.S. at 453. (Emphasis added)

Elaborating more on the lack of standards in the statute, the Court in Gougen stated that a statute of such standardless sweep allows policemen,

prosecutors, and juries to pursue their personal predilections. "Legislatures may not abdicate their responsibilities for setting the standards of the criminal law." 415 U. S. at 575. Concluding that the Statute was impermissibly vague, the Court stated that the "absence of any ascertainable standard for inclusion and exclusion (of conduct within the statute) is precisely what offends the Due Process Clause." 415 U.S. at 578. (Emphasis added)

The right to live is at least as important as the right to wear a flag on the seat of one's trousers, and it should be concluded that constitutional standards of equal vigor apply.

While the Pennsylvania capital sentencing procedure has taken significant steps toward meeting the demands of Furman v. Georgia, it has not gone far enough.

The Pennsylvania statute is sufficient insofar as it requires a bifurcated procedure, with the consideration of statutory aggravating and mitigating circumstances, and a provision for automatic appeal to the Pennsylvania Supreme Court in the event the penalty of death is imposed.

The Pennsylvania statute contains insufficient safeguards against arbitrary and capricious decisions by the trier of fact. The mitigating circumstances contained in the statute should be considered unconstitutionally vague because a reasonable jury would have to guess at the meaning of "age", "youth" and "lack of maturity". Arbitrary and capricious decisions are an inevitable result.

D. SIXTH AMENDMENT IMPLICATIONS OF ACT 46, 18 P.C.S.A. 1131

Section 2 of Act 46, 18 Pa. S.C.A. §1102 provides:

> "(a) Murder of the first degree.-A person who has been convicted of murder of the first degree shall

> be sentenced to death or to a term of life imprisonment in accordance with section 1311(d) of this title."

In the present case, the Commonwealth argues, correctly, that this section constitutes the legislative grant of authority to the courts of Pennsylvania to impose life or death as a sentence in conformity to the legislative plan set forth in section 1311. Section 1102 is a grant of power not in existence prior to the legislative enactment, and accordingly should be construed as the creation of substantive rights and liabilities in persons subjected to the grant of power.

Neither section 1102(a) nor section 1311(d) speaks in terms of the manner in which this power is exercised. Nor should they. Both sections are part of the Sentencing Code and it is clear that where the Legislature, in the Sentencing Code, has directed the courts as to the manner in which sentencing should be carried out, the Supreme Court of Pennsylvania has not hesitated to suspend the Legislative provisions as a violation of Constitutional principles of separation of powers.(7)

The defendant argues that Section 1311 of Act 46, when considered in its entirety, speaks only of imposition of the death sentence by a jury. This is correct. The defendant further argues that as a result trial courts hearing homicide cases in non-jury contexts are receiving offers of guilty pleas in homicide cases, have no power to impose a sentence of death. The defendant concludes therefore that section 1311 imposes an unconstitutional burden (the risk of death) upon the exercise of the right to jury trial granted by the Sixth Amendment to the United States Constitution.

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(7) See 18 Pa. C.S.A. Sections 1331, 1332, 1333, 1334, 1335, 1337, 1351, 1352, 1358, 1359, 1381, 1382.

In U. S. v. Jackson, 390 U.S. 570 (1968), the Supreme Court reviewed the Federal Kidnapping Act, 18 U.S.C. Sec. 1201(a), which provided that kidnapping was an "offense punishable by death if the verdict of the jury shall so recommend." The Court considered the problem to be one of statutory construction and in declaring the statute unconstitutional, concluded:

> "The statute sets forth no procedure for imposing the death penalty on a defendant who waives the right to jury trial, or upon one who pleads guilty." 390 U.S. 571.

While this is a binding statement of constitutional principles, it does not dispose of the questions raised by Section 1311. As we have noted, the Supreme Court of Pennsylvania has prohibited the Legislature of Pennsylvania from delineating procedural mechanisms for the carrying out of substantive rights. Accordingly, the Jackson argument may not be applied without a consideration of the procedural devices extant at the time the present offense was committed, and at the time the present case was tried.

Prior to Furman v. Georgia, the Pennsylvania Rules of Criminal Procedure included Rule 319 A "GUILTY PLEA PROCEDURE - MURDER CASE"; Subsection (c) of that rule provided:

> "If the crime is determined to be murder in the first degree, the sentence shall be life imprisonment, unless the judges unanimously agree upon a sentence of death."

Sections (a) and (b) of Rule 319 A provided for the convening of a court en banc, the taking of evidence, and decision by majority vote, as to first degree.

After the decision in Furman v. Georgia, the Supreme Court of Pennsylvania decided Commonwealth

v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972), in which it followed Furman v. Georgia and outlawed the death penalty as an alternative sentence in Pennsylvania. Thereafter, on November 29, 1972, Rule 319 A was amended to delete that part of Subsection (c) that provided "unless the judges unanimously agree upon a sentence of death."

The Pennsylvania Rules of Criminal Procedure are silent on the subject of trial of first degree murder cases without a jury. Thus, Rule 1102 "PROCEDURE WHEN JURY TRIAL IS WAIVED" provides:

> "(a) When a defendant waives a jury trial, the trial judge shall determine all questions of law and fact and render a verdict which shall have the same force and effect as a verdict of a jury."

It cannot be questioned that verdict in the meaning of this rule refers to the adjudication of guilt by a fact finder and not to the fixing of penalty. The fixing of penalty in first degree murder cases is the carrying out of a legislative provision providing for a mandatory sentence. The discretion of the fact finder exists only in the finding of the facts, not in the fixing of the penalty. If the appropriate standards for the exercise of that discretion are set forth by the Legislature (and in the judgment of this Court they have not been), the procedural mechanism to be followed need only be sufficiently clear and fair as to meet basic standards of due process.

In the present case, at the time the crime was committed, and at the time the case came to trial, there was no procedure in existence by which defendants, prosecutors, and trial courts could be guided in determining the mechanism by which the death penalty was to be imposed in

guilty plea, and non-jury trial cases.(8) It cannot be suggested that each trial judge could create his own procedural mechanism for imposing the death penalty. This would result in different procedures in different counties, or even in the same county among different judges.

Nor does section 1311 provide the mechanism. Act 46, 18 P.C.S.A. 1311(b) provides:

> "Instructions to jury in recording verdict. -
> In a trial for murder, the court shall inform the jury prior to their deliberations, as to the penalties for murder in the first degree, murder of the second degree, and murder of the third degree. The court shall also inform the jury that if they find the defendant guilty of murder of the first degree, it will be their further duty to determine whether the killing was accompanied by any aggravating or mitigating circumstances as set forth in sub-section (d) of this section after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree, they shall immediately return and render the same, which shall be recorded and shall not thereafter be subject to reconsideration by the jury or any member thereof."

---

(8) On September 22, 1976, the Supreme Court suspended Rule 319(a) and adopted Subchapter 350 Special Rules for Cases in which Death Sentence is Authorized (Rules 351, 352, 353, 354 and 355) and further amended Rules of Criminal Procedure 1103 and 4010. Subchapter 350 provides a complete procedure for guilty pleas and waiver trials, and fully meets the concerns set forth in this section. However, these procedures were not available at the time of trial of the instant case.

> "(c) Procedure at sentencing hearing. - After such verdict is recorded, and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received from the trial as may be relevant and admissible upon the question of aggravating and mitigating circumstances, and shall permit such argument by counsel and deliver such charge thereon as may be just and proper under the circumstances."
>
> "Aggravating circumstances must be proved beyond a reasonable doubt. Mitigating circumstances must be proved by a preponderance of the evidence. The jury shall then retire and consider the aggravating and mitigating circumstances and render such verdict respecting them as they shall agree upon. A failure of the jury to agree upon the aggravating and mitigating circumstances shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of the opinion that further deliberation by the jury will not result in an agreement upon the aggravating and mitigating circumstances, if may, in its discretion, discharge the jury from further consideration thereof, in which event, if no retrial is directed, the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury and recorded as aforesaid, and the jury shall be so informed prior to their deliberations. The court shall impose the sentence so fixed in other cases." (Emphasis added)

One must assume that the Legislature intends the usual meaning of technical words. The technical word jury means exactly that. The word court means exactly that. Section 1311(c) does not set forth a procedure for imposition of the death penalty by the court.

Absent such a procedure, therefore, the strictures of United States v. Jackson do apply in the present case. When the crime was committed, and when Theodore Moody went to trial, the right to a jury trial guaranteed under the 6th Amendment of the United States Constitution could only be exercised at the risk of imposition of the death penalty. It is no answer that the defendant took that risk. It is the existence of a "chilling" effect upon the exercise of the right to trial by jury that results in an unconstitutional burden on that right. Accordingly, the combined effect of the existence of a statutory scheme of imposition of the death penalty and the absence of a court commanded procedural rule for imposing that penalty, brings the present case squarely within the ambit of the prohibition contained in United States v. Jackson, 390 U.S. 570 (1968).

E. TRIAL ERRORS

The defendant alleges several errors in the court's instructions to the jury, and in the allowance of certain testimony during the course of the trial. Pennsylvania Rule of Criminal Procedure 1123(a) provides that all post-trial motions must be in writing specifically stating the grounds upon which relief is to be granted. This the defendant has not done. As a result, he has failed to properly raise and present these points as error. Furthermore, it has been consistently held that issues not raised at trial or in post-trial motions could not be raised for the first time on appeal. Commonwealth v. Irwin, 333 A.2d 735 (1975); Commonwealth v. Waltington, 306 A.2d 892 (1973); Commonwealth v. Agie, 296 A.2d 741 (1972).

The defendant contends that the errors assigned to the trial court are of such magnitude as to constitute a denial of due process of law guaranteed him by the Fourteenth Amendment of the U. S. Constitution, and Article 1 §9 of the Pennsylvania Constitution. The defendant further

argues that the failure of his trial counsel to make timely objections brings into question the denial to him of the effective representation of counsel to which he is entitled under the Sixth and Fourteenth Amendments of the U. S. Constitution.

Allegations of substantial or fundamental error do not serve to enable parties to seek reversal on alleged errors not raised in the trial court. Commonwealth v. Clair, 326 A.2d 274 (1974). The Pennsylvania Supreme Court has, however, recognized the doctrine of ineffective assistance of counsel and due process as a means of raising issues not raised at trial and otherwise disposed of because of the abolition of the fundamental error doctrine. The Court, however, went to great lengths to emphasize that the test for ineffective assistance was not illusory and that the allegation of ineffective representation of counsel was more than an opportunity to allow appellate courts to select the alleged errors they may wish to review. Commonwealth v. Clair, supra. The test for ineffective assistance of counsel, pronounced in Commonwealth ex rel. Washington v. Maroney, 235 A.2d 349 (1967) has been more recently affirmed in Commonwealth v. Robinson, 334 A.2d 687 (1975), which held that for the court to find that the defendant was denied effective assistance of counsel, the court must determine that the course chosen by defendant's trial counsel was without a reasonable basis designed to effectuate defendant's interests. The burden is on the defendant to demonstrate counsel's incompetence. The defendant has not sustained his burden to prove counsel's incompetence, since a mere allegation that counsel's failure to object lacked any rational basis designed to effectuate his client's interests, is insufficient.

Although in light of the above discussion, defendant's allegations of error would not be considered on appeal, this court has reviewed the various assignments of error and is of the opinion that they are without merit.

Defendant argues that the trial court erred in instructing the jury that second degree murder was, a matter of law, not involved in the case. This contention is groundless.

Prior to 1974, 18 C.P.S.A. §2502 contained murder in the first degree and murder in the second degree. The former included premeditated murder and felony murder; the latter was all other kinds of murder, If, during that time, a trial court had instructed the jury that murder in the second degree was not involved in a criminal homicide case as a matter of law, it would have committed an error and would have deprived the defendant of due process. Under current codification, effective at the time of the present case, murder is divided into murder of the first, second and third degrees. Murder in the first degree is premeditated murder. Under 18 C.P.S.A. §2502(b), murder of the second degree is defined as criminal homicide where the death of the victim occurred while the defendant was engaged as a principal or accomplice in the perpetration of a felony. "Perpetration of a felony" is defined in §2502(d) as the act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping. Murder of the third degree in §2502(c) includes all other kinds of murder other than murder in the first or second degrees. The facts of murder in the second degree are not presented in this case since there was no evidence that the murder was committed in the perpetration of a felony. The Court has no duty to charge on a particular legal theory which has no application to the facts presented in a given case. Commonwealth v. Bigham, 452 Pa. 554, 307 A.2d 255 (1973); Commonwealth v. Coleman, 402 Pa. 238, 166 A.2d 525 (1961). The trial court therefore was correct in instructing the jury that murder in the second degree was, as a matter of law, not involved in this case.

Next, the defendant argues that the trial court erred in its definition of causation used in its charge to the jury. The defendant assails the charge for inferring a proximate cause standard in violation of Commonwealth v. Root, 403 Pa. 571 (1961). In so doing, the defendant places emphasis on the use of the words "but for" and interprets them to indicate the use of the proximate causation standards. However, the defendant ignores other references to direct causation which would dispel any inference that the proximate cause standard was used.

> "It will be your duty in this case to determine whether James Price died as a result of strangulation inflicted upon him by this defendant, or whether this defendant was an accomplice of the person who actually inflicted this strangulation . . ." (N.T. p. 983).
>
> "That the defendant or an accomplice caused the death of James Price . . ." (N.T. p. 983).

The charge of the court must be viewed in its totality before legitimate criticism may be levelled at it. Commonwealth v. Zapato, 447 Pa. 332 (1972); Commonwealth v. Butler, 442 Pa. 30 (1971). Viewing the entire charge to the jury, it is clearly required that the acts of the defendant must be a direct cause of the death of James Price to sustain a conviction.

The defendant next contends that the trial court erred in its explanation of legal provocation as applied to voluntary manslaughter. The defense attacks the jury instructions as inadequate because there was no definition of "sufficient legal provocation" and the jury was given no guidelines along which to proceed in its determination. What is sufficient legal provocation as applied to voluntary manslaughter cannot be exactly defined, for it varies with the circumstances. Similarly, in reviewing the instant charge to the jury, it is clear that the court accurately instructed the jury that sufficient provocation was an objective standard and that the provocation had to be such that the defendant became impassioned and enraged and was without time to cool, so that he was placed

beyond the control of his reason and suddenly impelled to do the deed. Commonwealth v. Long, 333 A.2d 865 (1975); Commonwealth v. Robinson, 452 Pa. 316 (1973).

The defendant also claims the trial court erred in instructing the jury that "the absence of malice, the total absence of malice", is the controlling element which would reduce an unlawful killing from murder to manslaughter.

The distinction between murder and manslaughter is the presence or absence of malice. Commonwealth v. Simms, 324 A.2d 365, 228 Pa. Super. 85 (1974); Commonwealth v. Bowden, 456 Pa. 278, 309 A.2d 714 (1972); Commonwealth v. Moore, 398 Pa. 198, 157 A.2d 65 (1960). Insofar as the instruction was consistent with the above distinction, the Court did not err.

The use of the words "total absence of malice" and "to reduce" do not operate to shift the burden of proof from the prosecution to the defendant. The court charged that in order for the jury to find the offense of voluntary manslaughter, as well as murder in the first or third degrees, it must find that all the elements of the offense have been proven by the prosecution beyond a reasonable doubt.

The defendant alleges further error in the Court's permitting the cross examination of the defendant's mother as to the defendant's prior robbery, rape and burglary convictions. The testimony of Mrs. Moody was offered by the defense to establish the existence of the mitigating factor of "lack of maturity" as found in 18 P.S. §1311 (d)(2)(1). The fact that the defendant had previously been convicted of eleven felony counts, is probative evidence to rebut testimony of the defendant's lack of maturity. The admission of the evidence was proper.

Lastly, the defendant claims that the court erred in allowing the jury to hear excerpts of a statement given by the decedent to a U.S. Attorney

for the purpose of establishing motive. The statement of the decedent was admissible and relevant for proof of motive. Commonwealth v. Glover, 446 Pa. 432 (1970). The trial court was of the opinion that the contents of the statement were probative with regard to motive and that its probativeness outweighed any prejudice to the defendant. The testimony in this case reveals that the defendant read the statement and, therefore, the contents of the statement were quite probative so as to reveal precisely what the decedent had said.

The defendant, however, contends that the manner in which the proof was undertaken was highly prejudicial and constituted reversible error. The trial court, however, took precautions to insure that none of the details of the prior offenses were read to the jury. Large portions of the statement, considered inflammatory and highly prejudicial to the defendant, were excised so that no details of the direct crime were disclosed to the jury.

The trial judge did not abuse his discretion in permitting the contents of the statement to be read into evidence.

CONCLUSION

Theodore Moody was fairly tried and convicted of first degree murder. The verdict of the jury was supported by the evidence. The complaints of trial errors were not supported by the record. There is no ground for grant of a new trial.

The basic strictures of Furman v. Georgia, 408 U.S. 238 are still constitutionally binding upon the Commonwealth of Pennsylvania. The Supreme Court of the United States has reaffirmed Furman in Gregg, Profitt and Jurek cases, requiring only that the imposition of the death penalty be as a result of a

> "Carefully drafted statute that insures that the sentencing authority is given adequate information and standards, . . . and provided with standards to guide its use of that information . . . " (Emphasis added)

The U. S. Supreme Court pointed out in Gregg that each state's statute imposing the death penalty must be examined to determine whether it meets the constitutional test.

It is respectfully the opinion of this court that Act 46 of March 26, 1974, 18 P.C.S.A. 1102, 1311, fails to meet the constitutional standards set by the Supreme Court of the United States.

The present defendant raised the issue that the death penalty could not be imposed upon him because of his youth and lack of maturity. Youth and lack of maturity are mitigating circumstances set forth in §1311-d of Act 46, the presence of which prevents the imposition of the death penalty. Act 46 gives no definitions, standards or guidelines to the finder of fact in making a determination of whether a given defendant has the "youth", or "lack of maturity", or "age" which makes the statute applicable. Absence such definitions, standards or guidelines, juries considering comparable cases are required to apply terms which are inherently ambiguous and constitutionally vague. Thus, juries acting with honest intentions can and will come to varying conclusions in comparable cases resulting in the "freakishly arbitrary" imposition of the death penalty. This is constitutionally not permitted.

In the present homicide three defendants were charged, tried and convicted of the first degree murder of the same victim in the same criminal incident From the facts of the case, no one can tell the precise actions of any given co-defendant.

The cases were tried ad seriatum using the same witnesses (the principal witness being deceased and his testimony at a preliminary hearing being the only testimony that any jury had to connect any defendant with the crime). The present defendant was the youngest of the three defendants. His defense, and the defense of a co-defendant three years older than he, included reliance upon youth and lack of maturity as creating a mitigating circumstance within the meaning of Act 46. The jury which heard the co-defendant's case imposed a life sentence. The present jury imposed the death penalty.

In the judgment of this court, this is exactly the result that Furman, Gregg, Profitt and Jurek would prohibit.

In addition, there are further constitutional reasons why the death penalty cannot be imposed in this case. U. S. v. Jackson, 390 U.S. 570 (1968), prohibited the imposition of the death penalty as a risk of demanding one's 6th Amendment rights to jury trial. At the time this case was tried, there were no rules of the Pennsylvanis Supreme Court delineating the procedure to be followed by a trial court in imposing the death penalty when the case was heard without a jury. Accordingly, this placed a chilling and unconstitutional burden upon the exercise of the constitutional right to trial by jury.

For the foregoing reasons, the verdict of the jury in the present case, finding the defendant guilty of first degree murder, should be affirmed, but the sentence of death should be vacated and a sentence of life imprisonment should be imposed.

_____

LAWRENCE PRATTIS, J.

_____

JUANITA K. STOUT, J.

Judge David Savitt concurs in those portions of the foregoing opinion set forth in section D "Sixth Amendment Implications" and E "Trial Errors", and for that reason, concures in the result of the Court en banc, but does not reach and expresses no opinion upon the constitutionality of Act 46 under the 8th and 14th Amendments.

DAVID N. SAVITT, J.

COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION
FEBRUARY TERM, 1975
NOS. 1429-1430

COMMONWEALTH OF PENNA.

V.

THEODORE MOODY

OPINION OF COURT EN BANC
STOUT, SAVITT, PRATTIS, JJ.
(SAVITT, J. CONCURRING)

APPENDIX C
1C

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA: FEBRUARY TERM, 1975

VS. :

THEODORE MOODY : NOS. 1429-1430

O R D E R

AND NOW, this 9th day of Nov., 1976, the motions of defendant, Theodore Moody, in arrest of judgment and for new trial are denied for the reasons set forth in the Opinion of this Court filed October 20, 1976;

The Opinion of this Court filed October 20, 1976, having determined that the penalty of death fixed by the jury pursuant to Act 46 of 1974 was unconstitutionally applied, this Court determines that said penalty may not be imposed;

The decision of this Court that the death penalty may not be constitutionally imposed involves a controlling question of law as to which there is a substantial ground for differences of opinion, and an immediate appeal from this Order may materially advance the ultimate termination of the matter. This is intended to comply with the provisions of Rule 1312(a)(2) of the Rules of Appellate Procedure, and permission for appeal as provided in Section 501(b) of the Appellate Court Jurisdiction Act of 1970 is hereby granted.

The Commonwealth's motion for reconsideration of the decision of this Court, as contained in the Opinion of October 20, 1976, is denied. A copy of that Opinion is attached hereto and made a part hereof. All proceedings to stay meanwhile.

_____

PRATTIS, J.

_____

STOUT, J.

_____

SAVITT, J.

APPENDIX D
1D

18 Pa. C.S.A. §1102 (Supp. 1977-1978 at page 45)
Sentence for Murder

(a) Murder of the first degree.--A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with section 1311(d) of this title.

(b) Murder of the second degree.--A person who has been convicted of murder of the second degree shall be sentenced to a term of life imprisonment.

18 Pa. C.S.A. §1311 (Supp. 1977-1978 at pages 48-50)
Sentencing for Murder

(a) Findings by jury.--The jury before whom any person shall be tried for murder, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first degree, murder of the second degree or murder of the third degree.

(b) Instructions to jury and recording verdict.--In a trial for murder, the court shall inform the jury prior to their deliberations, as to the penalties for murder of the first degree, murder of the second degree and murder of the third degree. The court shall also inform the jury that if they find the defendant guilty of murder of the first degree, it will be their further duty to determine whether the killing was accompanied by any aggravating or mitigating circumstances as set forth in subsection (d) of this section after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof.

(c) Procedure at sentencing hearing.--After such a verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received from the trial as may be relevant and admissible upon the question of aggravating and mitigating circumstances and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. Aggravating circumstances must be proved beyond a reasonable doubt. Mitigating circumstances must be proved by a preponderance of the evidence. The jury shall then retire and consider the aggravating and mitigating circumstances and render such verdict respecting them as they shall agree upon. A failure of the jury to agree upon the aggravating and mitigating circumstances shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of the opinion that further deliberation by the jury will not result in an agreement upon the aggravating and mitigating circumstances, it may, in its discretion, discharge the jury from further consideration thereof, in which event if no retrial is directed, the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury and recorded as aforesaid and the jury shall be so informed prior to their deliberations. The court shall impose the sentence so fixed as in other cases.

(d) Aggravating and mitigating circumstances.--If a murder of the first degree is accompanied by at least one of the following aggravating circumstances and none of the following mitigating circumstances, the person convicted shall be sentenced to death. If a murder of the first degree is not accompanied by any of the following aggravating circumstances or is accompanied by at least one of the following mitigating circumstances the person convicted shall be sentenced to life imprisonment:

(1) Aggravating circumstances:

(i) The victim was a fireman, peace officer or public servant concerned in official detention as defined in section 5121 of this title (relating to escape), who was killed in the performance of his duties.

(ii) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(iii) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(iv) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(v) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(vi) The defendant committed a killing while in the perpetration of a felony.

(vii) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(viii) The offense was committed by means of torture.

(ix) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(2) Mitigating circumstances:

(i) The age, lack of maturity, or youth of the defendant at the time of the killing.

(ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.

(iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress).

(e) Guilty pleas and non-jury trials.--In cases of pleas of guilty, or trial by court, the court shall impose sentence in accordance with Rules of Criminal Procedure as promulgated by the Supreme Court of Pennsylvania.

(f) Record of death sentence to Governor.--Where a sentence of death is imposed, the clerk of the court wherein conviction takes place, shall within ten days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

(g) Review of death sentence.--A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania within sixty days after certification by the sentencing court of the entire record. In the event that the sentence of death shall for any reason be invalidated then the convicted defendant shall undergo the sentence of life imprisonment.

Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1205.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

THEODORE MOODY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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ARGUMENT.

I. The Issue Tendered by the Petition Is Not Raised in the Record.

The petitioner states its first issue as follows:

> Is the Pennsylvania death penalty statute which substantially restricts the imposition of that penalty and which only marginally restricts the mitigating evidence that may be considered at sentencing, violative of the Eighth and Fourteenth Amendments?

This defendant was sentenced under a statute providing for mandatory imposition of death in nine (9) categories of first degree murder unless the defendant proves by a preponderance of the evidence one of three mitigating circumstances: (1) consent by the victim, (2) duress, as defined, upon the defendant, and (3) "The age, lack of maturity, or youth of the defendant at the time of the killing". It is only the meaning of the third mitigating circumstance that was considered by the Supreme Court of Pennsylvania and that Court held that, as it defined the Pennsylvania law, the statute precluded consideration of other relevant information about the defendant whose fate was to be decided. On this narrow basis the Court held the statute did not pass constitutional muster under *Gregg, et al.*

Petitioner represents (Petition, p. 13) that the case presents an entirely different issue from the one decided. The prosecutor argues: "The Pennsylvania death penalty statute directly presents to this Court a question which remains largely unanswered: whether, in what circumstances, and to what extent, a legislature may constitutionally define the factors to be considered by a sentencing authority as militating against the imposition of the death penalty?" That all-encompassing question is simply not

presented by this record and was not decided by the Court below.

The Pennsylvania Supreme Court has decided only that in the context of an otherwise mandatory death penalty (where any one of nine (9) aggravating circumstances was found to exist) the legislature could not exclude jury consideration of all relevant information bearing on the crime or the defendant except the three (3) circumstances listed in the Statute.

The second issue tendered by the Petition is whether Pennsylvania could permissibly impose a death sentence on one convicted of aggravated murder while serving a life sentence at the time of the commission of the offense. That issue is not presented by this record either, for as the Pennsylvania Supreme Court clearly states:

> The question, however, of a mandatory death sentence for a murderer already serving a life sentence is not properly before us, since § 1311 does not make death mandatory in such circumstances.

The Court also observes in a footnote (Petition, 20A n. 21) that this respondent was not serving a Pennsylvania life sentence at the time of this murder and that his District of Columbia sentences were still on appeal at that time. The Court does not foreclose the possibility that if properly called upon to make such a decision it might hold the Pennsylvania Statute restricted to persons serving Pennsylvania life sentences or to persons whose life sentences had become final at the time of the murder in question or that a District of Columbia sentence of twenty (20) years to life was not the life sentence contemplated by the Pennsylvania Statute. None of these issues has yet been decided in Pennsylvania and certainly have not been decided in this case. Therefore, the second question presented by the Petition for Certiorari is not before this Court under 28 U. S. C. § 1257.

A. The Pennsylvania Reading of Its Statute.

The Commonwealth argues in its Petition as though it were defending an uninterpreted state statute or even a federal statute. It ignores the truism that this Court, for present purposes is bound by what the Supreme Court of Pennsylvania says the state statute means. *Coleman v. Alabama,* 399 U. S. 1 (1970); *Watts v. Seward School Bd.,* 381 U. S. 126; *Hortonville J. S. D. No. 1 v. Hortonville Ed. Assn.,* 426 U. S. 482.

This statute has been definitively held to restrict jury consideration of mitigating circumstances as follows (*Com. v. Moody,* — Pa. —, 382 A. 2d at p. 447):

> Section 1311(d) limits the circumstances which the jury is to consider mitigating to "the following circumstances" and lists three:
>
> (i) The age, lack of maturity, or youth of the defendant at the time of the killing.
>
> (ii) The victim was a participant in or consented to defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.
>
> (iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress).
>
> Of the three listed, only subsection (d)(2)(i) can be said to focus the jury's attention upon the character and record of the defendant as opposed to the circumstances of the crime, and that only to the limited extent of determining his age, lack of maturity, or youth *at the time of the killing*. Although a prior conviction

for an offense punishable by life imprisonment is an aggravating circumstance, the absence of a prior criminal record or even positive achievements or good works cannot be considered as mitigating. Whatever the offender's potential for rehabilitation, his life is to be terminated without consideration of it unless his status or situation at the time of the killing can be found to be a mitigating circumstance.

If the Pennsylvania statute, as the Commonwealth read it before *Moody,* did not limit the mitigating circumstances in the fashion the Supreme Court of Pennsylvania has now suggested, it certainly does since the decision in *Moody* and that is what is before this Court, not the Commonwealth's losing argument in the Pennsylvania Supreme Court as to what was intended to be covered by the Pennsylvania Legislature.

B. The Pennsylvania Supreme Court's Reading of the Constitutional Requirement.

The Pennsylvania Supreme Court, reviewing the plurality opinions of this Court in the *Gregg* quintet, concluded that the Pennsylvania scheme does not pass constitutional muster for the following stated reason:

> Thus, in our view, in order to protect a defendant from cruel and unusual punishment in a capital case, it is now necessary both that the aggravating circumstances that will justify the imposition of the death penalty be clearly defined for the sentencing authority, *and* that the sentencing authority be allowed to consider whatever mitigating evidence relevant to his character and record the defendant can present. (Petition for Cert., 16A, 382 A. 2d at p. 449)

The Court also held that the substantive limitation of these mitigating circumstances is aggravated by the legislative restriction of the jury's consideration to their existence and effect *"at the time of the killing."* (Petition for Cert., 17A, n. 19; 382 A. 2d at p. 449 n. 19).

Petitioner argues at length that the plurality opinions of this Court in the *Gregg* quintet provide inadequate guidance. But the Supreme Court of Pennsylvania, together with the Court of Appeals of Maryland, in *Blackwell v. State,* 278 Md. 466, 365 A. 2d 545 (1976), did not experience the Commonwealth's difficulty in distilling a common element from these decisions, which the Pennsylvania Court summarizes in a quotation from the plurality opinion in *Jurek v. Texas,* saying:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. 428 U. S. at p. 276, 96 S. Ct. at p. 2957, 49 L. Ed. 2d at p. 941.

Bound by *Moody* as to the meaning of the state law, this record presents merely an application of the *Jurek, Proffitt, Woodson* and *Roberts* rules to a law *prohibiting* jury consideration of all possible relevant information about the capital candidate.

II. Supervening Legislation.

Although Petitioner is at pains to argue, notwithstanding the holding of the Supreme Court of Pennsylvania in this case, that the statute allows consideration of a broader range of mitigating circumstances than appears to us on its face, the legislature of Pennsylvania appears to have yielded to the Pennsylvania decision in the *Moody* case and has, in fact, passed an amending statute adding two further descriptions of mitigating circumstances to be considered by the jury. Section 1311(d) of the sentencing code has been amended by adding subsections iv and v, which read as follows:

(iv) The killing was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(v) Sufficient other evidence relevant to character and record of the defendant as to be considered a mitigating circumstance.

While perhaps inartful, the foregoing language is the legislature's response to *Commonwealth v. Moody*. The legislature has thus made it impossible for any future capital defendant to use the *Moody* grounds as a basis for attacking the constitutionality of the statute and this renders review by this Court an academic exercise with respect to the future of the law of Pennsylvania. This Bill (S. 1233 as amended 2-22-78) has been sent to the governor as of 4-19-78.

While this supervening legislation does not entirely moot the issue presented by the Petition, (see: *Aikens v. California*, 406 U. S. 813, 32 L. Ed. 2d 511, 92 S. Ct. 1931 (1972)) there is now considerably less of the urgent "societal importance" and "far reaching effect" suggested by the Commonwealth concerning this decision. (Petition for Cert. p. 22).*

This Court has held that jurisdiction, even when it exists, should not be exercised unless the case tenders constitutional issues in clean-cut form without the problems of abstractness posed in this case by supervening legislation (*Socialist Labor Party v. Gilligan*, 406 U. S. 583, 32 L. Ed. 2d 317, 92 S. Ct. 1716 (1972)), which may indeed, under the law of Pennsylvania, have retrospective effect in view of the fact that it improves rather than worsens the lot of capital defendants. See *Dobbert v. Florida*, — U. S. —, 53 L. Ed. 344, 97 S. Ct. 2290.

* The decision will not even affect respondent's two co-defendants. They were sentenced to life imprisonment.

III. Finality.

Petitioner seeks certiorari from a decision of the Supreme Court of Pennsylvania which was rendered upon an *interlocutory appeal by the Commonwealth*. The background of this procedure is significant on the issue of finality.

At the conclusion of his trial, respondent's sentence was fixed at death by the jury but this verdict does not constitute the imposition of sentence. Following the death verdict, respondent filed his post-trial motions, alleging a variety of grounds for a new trial in addition to his attack on the constitutionality of the death penalty statute.

The post-verdict Motions Court consisting of three (3) Judges of the Court of Common Pleas decided two federal issues not presently before this Court. The Supreme Court of Pennsylvania notes that the three Judge Court found the legislative description of the statutory mitigating circumstances unconstitutionally vague because a reasonable jury would have to guess at the meaning of the terms "age", "youth" and "lack of maturity" and, secondly, the Court invalidated the statute on grounds based upon this Court's decision in *United States v. Jackson*, 390 U. S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), because at the time of trial the death penalty was not applicable to non-jury and guilty plea proceedings, but only to those defendants who opted for trial by jury.

The Supreme Court of Pennsylvania specifically eschewed decision of either of these federal constitutional issues, placing its decision instead upon the unconstitutional restriction of mitigating evidence. 382 A. 2d at p. 444.

Because of the interlocutory certification by the trial Court of the death issue, the only question presented to the Supreme Court of Pennsylvania was the constitutionality of the statute and respondent Moody was unable to

appeal any of the issues decided against him by the Court of Common Pleas relating to errors in his trial, the ineffectiveness of trial counsel, etc. His appeal must await sentencing, which has been stayed by the trial Court pending final disposition of the single certified issue. Appellate Court Jurisdiction Act of 1970; 17 P. S. § 211.501(b) (Supp. 1977-78).

This means that, if the Commonwealth were to prevail in this Court, there would remain two federal issues relating to the death penalty for decision by the Supreme Court of Pennsylvania, as well as all of the state issues decided by the Court of Common Pleas but not yet ripe for consideration by the Supreme Court of Pennsylvania because of lack of finality of the matter as brought to that Court.

This Court has made it clear that finality for this purpose is a practical question to be decided primarily in light of the need to avoid "the mischief of economic waste and the inconvenience and costs of piecemeal review". The Court has limned out four categories of reviewable proceedings which, nevertheless, may require further state Court decision.

This Court considered in *Cox Broadcasting Co. v. Cohn*, 420 U. S. 469, 43 L. Ed. 328, 95 S. Ct. 1029, the nature of those cases in which finality was questionable but sufficient to permit review under 28 U. S. C. § 1257. *Cox* describes four (4) categories of cases in which the necessity for further proceedings in state Courts had not destroyed the finality of decisions seeking review.

The first are those in which decision of the federal issue is conclusive of the outcome of further proceedings.

The second are those in which the state-decided federal issue will survive and require decision regardless of the outcome of further state proceedings.

The third comprises those in which later review of the federal issue cannot be had whatever the ultimate outcome of the case. (In such cases, if petitioner prevails, the federal issue will be mooted; if he loses on the merits, the governing state law would not permit him again to present his federal claims for review.)

The fourth includes those situations in which petitioner might win the entire case in state Court on nonfederal grounds, thus rendering federal review unnecessary, but refusal of immediate review might seriously erode an important federal policy.

We doubt that the instant case falls into any of these categories. If the Commonwealth prevails in this Court on its present Petition, the application of the death penalty to this petitioner still requires resolution of the vagueness and *Jackson* grounds decided by the lower state Courts but not considered by the Supreme Court of Pennsylvania. It further depends upon state grounds urged by Respondent independent of the federal Constitution. If the Commonwealth should prevail here it will surely return seeking review of the two pretermitted constitutional issues. Later state proceedings could, but need not, moot the present issue. Abstractness, piecemeal review, expense and delay inhere in the present posture of the case.

Respondent respectfully suggests the Petition should be denied.

Respectfully submitted,

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CERTIFICATION OF SERVICE.

I, JOHN ROGERS CARROLL, ESQUIRE, counsel for respondent, THEODORE MOODY, hereby certify that I have caused a copy of the Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania to be served upon Steven H. Goldblatt, Esquire, counsel for Petitioner, Robert P. Kane, Attorney General of the Commonwealth of Pennsylvania, Vincent X. Yakowicz, Solicitor General of the Commonwealth of Pennsylvania by depositing three copies each in the United States Mail, First Class, Postage Prepaid, addressed to:

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DATED: 27th April, 1978

Supreme Court, U. S.
FILED
MAY 15 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
NO. 77-1205

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER

v.

THEODORE MOODY,
RESPONDENT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN H. GOLDBLATT
DEPUTY DISTRICT ATTORNEY FOR LAW

GAELE McLAUGHLIN BARTHOLD
ASSISTANT DISTRICT ATTORNEY

EDWARD G. RENDELL
DISTRICT ATTORNEY OF
PHILADELPHIA COUNTY

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ARGUMENT

NO ARGUMENT ADVANCED BY RESPONDENT MILITATES AGAINST THE ISSUANCE OF A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW.

Respondent's answer to the petition filed in this case not only evidences a total misconception as to the thrust of that petition but also relies upon a panoply of erroneous facts and conclusions. In seeking to dissuade this Court from granting the review requested, respondent first suggests that neither of the issues framed in the petition are fairly presented by the record in question. This assertion is insupportable. In part, he argues that no constitutional issue exists because this Court is bound by the state court's determination that the Pennsylvania statute[1] is invalid by reason of its restriction of the relevant mitigating circumstances to the defendant's status or situation AT THE TIME OF THE KILLING. By that argument, respondent effectively acknowledges the very constitutional issue upon which review is sought. Thus, his suggestion that the first issue framed by petitioner is without record basis is entirely frivolous.

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[1] 18 Pa.C.S.A. §1311(d)(2)(i).

Similarly devoid of merit is respondent's assertion that this case is an inappropriate vehicle for considering whether an otherwise unduly restrictive mitigating circumstances provision may nevertheless be constitutionally valid when applied to a defendant already serving a life sentence at the time of the commission of the relevant offense. In arguing that this issue is not presented, simply because §1311 does not make death mandatory in this circumstance, respondent has misconstrued the real import of the question which is presented. Within the context of this case, it is irrelevant that, under the Pennsylvania scheme, the death penalty is not mandatory when applied to a life prisoner. Rather, since this defendant was serving seven life sentences at the time of the commission of the relevant offense, the issue is simply whether the adequacy of the Pennsylvania mitigating circumstances provision may be reviewed under substantially different standards than those utilized in cases which did not involve prisoners serving life sentences. The fact that this respondent was, in fact, serving seven life sentences is sufficient to raise that limited question.[2]

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[2] For this purpose, respondent's reliance upon (1) the fact that he was not serving a Pennsylvania life sentence at the time of the killing and (2) the fact that the convictions for the seven (7) life sentences were still on appeal is entirely misplaced. As was noted in the Commonwealth's original petition, the ninth aggravating circumstance contained in the Pennsylvania Death Penalty Statute is that:

(Footnote continued on next page.)

NEXT, RESPONDENT SUGGESTS THAT THE PENDENCY OF NEW PENNSYLVANIA LEGISLATION, WHICH WOULD RESTORE THE DEATH PENALTY AND COMPLY WITH THE STATE SUPREME COURT'S DECISION IN THIS CASE, IS A FACTOR WHICH MILITATES AGAINST THE ISSUANCE OF A WRIT OF CERTIORARI.[3] THIS CONTENTION IS ALSO

FOOTNOTE 2 CONTINUED

> THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

18 PA.C.S.A. §1311(D)(IX) (SUPP. 1977-1978) (EMPHASIS ADDED). THUS, ON ITS FACE, THIS STATUTE DEEMS IRRELEVANT THE APPELLATE STATUS AND LOCALE OF THE PRIOR CRIMES AT ISSUE. FOR THE SAME REASON, IT IS IMMATERIAL THAT THE SENTENCES IMPOSED UPON RESPONDENT WERE EACH TWENTY YEARS TO LIFE IMPRISONMENT. THE POINT IS THAT A LIFE SENTENCE WAS IMPOSABLE FOR EACH OF THE SEVEN SEPARATE MURDERS FOR WHICH RESPONDENT STOOD CONVICTED.

3 RESPONDENT REPRESENTS, AT PAGES 5-6 OF HIS BRIEF, THAT SENATE BILL NO. 1233, AMENDING THE PRESENT STATUTE, WAS PASSED BY THE LEGISLATURE AND SENT TO THE GOVERNOR AS OF APRIL 19, 1978. THIS IS A SERIOUS MISSTATEMENT; NO AMENDMENTS TO THE DEATH PENALTY STATUTE HAVE BEEN PASSED BY THE PENNSYLVANIA LEGISLATURE OR SENT TO THE GOVERNOR. SENATE BILL NO. 1233 WAS, IN FACT, PASSED BY THE SENATE ON FEBRUARY 27, 1978, AND THEN SENT TO THE HOUSE OF REPRESENTATIVES WHERE, ON MARCH 13, 1978, IT WAS REFERRED TO THE JUDICIARY COMMITTEE. WHILE IN THAT COMMITTEE, THE BILL WAS COMPLETELY "GUTTED." THUS, THE VERSION SUBSEQUENTLY PASSED BY THE HOUSE ON APRIL 18, 1978, DIFFERED SUBSTANTIALLY FROM THE PRIOR SENATE VERSION. IT HAS NOW BEEN RETURNED TO THE SENATE FOR CONCURRENCE IN THE HOUSE AMENDMENTS; HOWEVER, NO ACTION WILL BE TAKEN THEREON AT LEAST UNTIL MAY 22, 1978, WHEN THE LEGISLATURE RECONVENES FOLLOWING ITS CURRENT RECESS.

WITHOUT MERIT. AS RESPONDENT HIMSELF ADMITS, EVEN THE EXISTENCE OF SUCH NEW LEGISLATION WOULD NOT MOOT THE ISSUE PRESENTED BY THIS CASE. INDEED, REGARDLESS OF ITS MORE BROAD-BASED RAMIFICATIONS, THE MOODY DECISION ITSELF AFFECTS NOT ONLY RESPONDENT'S SENTENCE BUT ALSO APPROXIMATELY TWENTY (20) OTHER DEATH PENALTY SENTENCES WHICH WERE IMPOSED IN PENNSYLVANIA UNDER THE DEATH PENALTY STATUTE HERE AT ISSUE. THIS, IN AND OF ITSELF, IS OF SUFFICIENT IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT, ESPECIALLY WHERE THIS COURT'S RECENT DEATH PENALTY DECISIONS WERE THE VERY BASIS FOR DECLARING THOSE SENTENCES CONSTITUTIONALLY INVALID.

MOREOVER, THE FACT THAT VARIOUS PROPOSALS TO MODIFY THE CURRENT STATUTE -- ONE OF WHICH WAS, IN FACT, INITIALLY DRAFTED BY THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE -- HAVE BEEN INTRODUCED IN THE LEGISLATURE IN NO WAY LESSENS THE URGENCY AND NECESSITY FOR THIS COURT TO REVIEW THAT STATUTE. THE PENDENCY OF CURATIVE LEGISLATION ONLY INDICATES THE LEGISLATURE'S CLEAR DESIRE TO HAVE AN ENFORCEABLE DEATH PENALTY IN FORCE IN PENNSYLVANIA AS SOON AS POSSIBLE SINCE NONE PRESENTLY EXISTS. IF THE LEGISLATURE WERE TO WAIT UNTIL THIS LITIGATION IS CONCLUDED BEFORE INITIATING NEW LEGISLATION, PENNSYLVANIA WOULD BE WITHOUT A DEATH PENALTY FOR AN UNNECESSARILY EXTENDED PERIOD OF TIME. INSTEAD, THE LEGISLATURE HAS RESPONDED TO THE PRESENT SITUATION BY PURSUING ALL AVENUES TO INSURE, REGARDLESS OF THE OUTCOME OF THE MOODY LITIGATION, THAT PENNSYLVANIA WILL BE WITHOUT

A DEATH PENALTY FOR THE SHORTEST POSSIBLE TIME. SHOULD THE COMMONWEALTH PREVAIL BEFORE THIS COURT, AND THE LEGISLATURE ALSO PASS A NEW DEATH PENALTY STATUTE, IT IS CLEARLY WITHIN THE LEGISLATURE'S PREROGATIVE TO THEN RE-AMEND THAT STATUTE IN CONFORMITY WITH THIS COURT'S MANDATE. THE REAL POINT IS THAT AN IMPORTANT PENNSYLVANIA LAW SHOULD NOT BE STRUCK DOWN BASED UPON A STATE COURT'S ERRONEOUS INTERPRETATION OF FEDERAL LAW WITH NO RECOURSE BEFORE THE ULTIMATE ARBITER OF THE UNITED STATES CONSTITUTION.

MOREOVER, WHERE AN ISSUE AS IMPORTANT AS THE DEATH PENALTY IS INVOLVED, THE FACT THAT ONLY THE LAW OF ONE STATE MAY BE AFFECTED SHOULD NOT REQUIRE THIS COURT TO DECLINE REVIEW. CERTAINLY, THIS COURT HAS, TO DATE, EXTENSIVELY REVIEWED MANY DEATH PENALTY STATUTES AND HAS INDICATED THAT EACH SCHEME MUST BE REVIEWED ON A STATUTE-BY-STATUTE BASIS. Gregg v. Georgia, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935-2936 (1976). THIS IS NO LESS TRUE WHERE, AS HERE, THE STATE SEEKS REVIEW THAN IT IS IN CASES WHERE AN INDIVIDUAL DEFENDANT IS PETITIONING FOR THAT REVIEW.

FINALLY, RESPONDENT SUGGESTS THAT REVIEW SHOULD HERE BE DENIED BECAUSE THE JUDGMENT RENDERED BY THE PENNSYLVANIA SUPREME COURT, PURSUANT TO AN INTERLOCUTORY APPEAL, IS NOT A FINAL JUDGMENT FOR THE PURPOSES OF 28 U.S.C.A. §1257. IN SUPPORT OF THIS CONTENTION, HE ACKNOWLEDGES THAT Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), DELINEATES FOUR CATEGORIES OF CASES WHERE REVIEW

BY THIS COURT IS PROPER, DESPITE THE NECESSITY FOR FURTHER STATE COURT PROCEEDINGS. HE ARGUES, HOWEVER, THAT THIS CASE IS NOT WITHIN THE PURVIEW OF ANY OF THOSE CATEGORIES.

THIS LAST ASSERTION BY RESPONDENT IS FLATLY ERRONEOUS. IN Cox, SUPRA AT 482, 95 S.CT. AT 1039, THIS COURT CLEARLY STATED THAT FINALITY EXISTS, FOR §1257 PURPOSES, WHERE THE FEDERAL CLAIM HAS BEEN FINALLY DECIDED AND CANNOT BE LATER REVIEWED, WHATEVER THE ULTIMATE OUTCOME OF THE CASE.[4] THIS CASE UNQUESTIONABLY FALLS SQUARELY WITHIN THAT CATEGORY. THE DEATH PENALTY HERE AT ISSUE WAS VOIDED BY A LOWER COURT PRIOR TO THE FORMAL IMPOSITION OF SENTENCE. AT THE SAME TIME, DEFENDANT'S REQUEST FOR A NEW TRIAL WAS DENIED. A CERTIFIED INTERLOCUTORY APPEAL WAS THEN REQUESTED BY THE COMMONWEALTH AND ALLOWED BY THE PENNSYLVANIA SUPREME COURT, BECAUSE OF THE STRONG POSSIBILITY, UNDER PENNSYLVANIA LAW, THAT THE RE-IMPOSITION OF THE DEATH PENALTY WOULD

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4 SPECIFICALLY, THIS COURT STATED THAT IT WOULD TREAT AS FINAL JUDGMENTS, FOR §1257 PURPOSES, THOSE CASES WHERE:

> THE FEDERAL CLAIM HAS BEEN FINALLY DECIDED, WITH FURTHER PROCEEDINGS ON THE MERITS IN THE STATE COURTS TO COME, BUT IN WHICH LATER REVIEW OF THE FEDERAL ISSUE CANNOT BE HAD, WHATEVER THE ULTIMATE OUTCOME OF THE CASE. THUS, IN THESE CASES, IF THE PARTY SEEKING INTERIM REVIEW ULTIMATELY PREVAILS ON THE MERITS, THE FEDERAL ISSUE WILL BE MOOTED; IF HE WERE TO LOSE ON THE MERITS, HOWEVER, THE GOVERNING STATE LAW WOULD NOT PERMIT HIM AGAIN TO PRESENT HIS FEDERAL CLAIMS FOR REVIEW. THE COURT HAS TAKEN JURISDICTION IN THESE CIRCUMSTANCES PRIOR TO COMPLETION OF THE CASE IN THE STATE COURTS.

Cox Broadcasting Corporation v. Cohn, supra, AT 1039.

BE BARRED AFTER A LIFE SENTENCE WAS FORMALLY IMPOSED ON THIS RESPONDENT. IN A LETTER, FILED WITH THE PENNSYLVANIA SUPREME COURT, SUPPLEMENTING THE COMMONWEALTH'S PETITION TO THAT COURT, SEEKING INTERLOCUTORY REVIEW OF THE DEATH PENALTY QUESTION, THE COMMONWEALTH INDICATED:

> THE COMMONWEALTH IS REQUESTING PRE-SENTENCE REVIEW OF THE CONSTITUTIONALITY OF THE DEATH PENALTY TO AVOID LITIGATION OF A POTENTIALLY TROUBLESOME ISSUE. SPECIFICALLY, WE ARE CONCERNED THAT WERE THIS CASE TO BE REVIEWED IN THE ORDINARY COURSE OF APPEAL FROM A JUDGMENT OF SENTENCE, THE DEFENSE WOULD CLAIM THAT THE DEATH PENALTY ISSUE IS MOOT. THE DEFENDANT, COULD CLAIM THAT HAVING BEEN SENTENCED TO LIFE IMPRISONMENT, HE COULD NOT SUBSEQUENTLY BE SENTENCED TO DEATH, EVEN IF THIS COURT OVERTURNED THE LOWER COURT RULING THAT THE DEATH PENALTY IS UNCONSTITUTIONAL. COMMONWEALTH V. SILVERMAN, 442 PA. 211 (1971); COMMONWEALTH V. MARKS, 442 PA. 208 (1971) AND COMMONWEALTH V. WRONA, 442 PA. 201 (1971) MIGHT SUPPORT SUCH A CLAIM. IN SILVERMAN, THIS COURT STATED "... THAT THERE IS NO DOUBT IN OUR MINDS THAT IF THE ISSUE IS EVER RAISED, THE UNITED STATES SUPREME COURT WILL RULE THAT THE MODIFICATION OF A SENTENCE IMPOSED ON A CRIMINAL DEFENDANT WHICH INCREASES THE PUNISHMENT IS DOUBLE JEOPARDY, AND WE NOW SO RULE." 442 PA. AT 217.

THE PENNSYLVANIA SUPREME COURT THEREAFTER GRANTED THE PETITION TO ALLOW AN INTERLOCUTORY APPEAL. THUS, THE ONLY REASON THE DEATH PENALTY QUESTION WAS PRESENTED IN THAT POSTURE WAS BECAUSE THE QUESTION, HAVING ARISEN FROM A TRIAL COURT ORDER DECLARING THE DEATH PENALTY UNCONSTITUTIONAL, MIGHT NOT SURVIVE THE IMPOSITION OF A LIFE SENTENCE. FINALITY WAS THE VERY REASON INTERLOCUTORY REVIEW WAS REQUESTED AND GRANTED IN THE FIRST INSTANCE. THUS, THE QUESTION IS CLEARLY REVIEWABLE AS A "FINAL ORDER" UNDER THE HOLDINGS OF THIS COURT.

CONCLUSION

FOR THESE ADDITIONAL REASONS, PETITIONER, THE COMMONWEALTH OF PENNSYLVANIA, RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA : OCTOBER TERM, 1977
PETITIONER

V. :

THEODORE MOODY : NO. 1205
RESPONDENT

CERTIFICATION OF SERVICE

I, STEVEN H. GOLDBLATT, ESQUIRE, COUNSEL FOR PETITIONER, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED THIS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO BE SERVED UPON JOHN ROGERS CARROLL, ESQUIRE, AND JOSEPH D. MONTGOMERY, III, ESQUIRE, COUNSEL FOR RESPONDENT, THEODORE MOODY, BY DEPOSITING THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO JOHN ROGERS CARROLL, ESQUIRE, 326 THREE PENN CENTER, PHILADELPHIA, PENNSYLVANIA, 19102, AND THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO JOSEPH D. MONTGOMERY, III, ESQUIRE, 2700 LEWIS TOWER BUILDING, FIFTEENTH AND LOCUST STREETS, PHILADELPHIA, PENNSYLVANIA, 19102, ON THURSDAY, MAY 4, 1978.

STEVEN H. GOLDBLATT